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RECORD, CASE No. 14,218.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 828.

T. B. COX, THOMAS TINSLEY, AND S. E. ECHOLS, PLAINTIFFS IN ERROR,

vs.

E. J. HART.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 7, 1890.

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1 { The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco. }

THE STATE OF TEXAS, }
County of McLennan. }

To the honorable judge of the U. S. circuit court for the northern district of Texas, at Waco:

Your petitioner, Edmund J. Hart, hereinafter styled plaintiff, comes and complains to your honor of T. B. Cox, Thomas Tinsley, S. E. Echols, D. E. Swim, and S. L. Swim, hereinafter styled defendants, and represents that plaintiff, Edmund J. Hart, is a citizen and resident in the parish of Orleans, in the State of Louisiana, and that defendant Thomas Tinsley is a citizen of England, in the Kingdom of Great Britain, temporarily residing in the city of New York, in the State of New York, and that the defendants T. B. Cox, S. E. Echols, D. E. Swim, and S. L. Swim are citizens of the State of Texas and residing in the county of McLennan, in said State of Texas and in said northern district of Texas.

And plaintiff further represents that on, to wit, the first day of January, 1886, he, plaintiff, was, as he still is, the owner by fee-simple title of that certain tract or parcel of land situate, lying, and being in said county of McLennan, State of Texas, and in said northern district of Texas, described as follows:

Beginning at the northwest corner of a survey made for Ambrose Hall, thence north 28 west 556 varas to the N. E. corner of a survey made for L. Faulkner; thence N. 62 E. at 356 varas to the S. E. corner of a survey made for M. L. Birdsall, from which an elm marked F bears N. 26 E. 34 varas, a willow marked H bears S. 89 E. 30 varas; thence N. 28 W. at 484 varas to the N. W. corner of this survey, a mound; thence N. 62 E. at 3,274 varas to the N. E. corner of this survey; thence S. 28 E. 1,583 varas to the N. E. corner of a survey made for E. Yeamans; thence S. 62 W. at 1,637 varas the N. W. corner of said E. Yeamans' survey; thence S. 28 E. at 427 varas, Thos. Thacker's N. E. corner; thence S. 62 W.
2 556 varas to the east line of Ambrose Hall survey; thence N. 28 W. 700 varas to the N. E. corner of Ambrose Hall; thence S. 62 W. at 344 varas a branch of Cow bayou, in all 788 varas, to the beginning, being the same tract of land patented by the State of Texas to the heirs of James Stewart by patent No. 379, volume 5, by virtue of certificate No. 815.

And plaintiff alleges that on said last-mentioned date he was, as he still is, entitled to the possession of said land and premises.

And plaintiff avers that afterward, on, to wit, said first day of January, 1886, plaintiff being entitled to the possession thereof as aforesaid, said defendants unlawfully and with force and arms entered upon said land and premises and ejected plaintiff therefrom and dispossessed him thereof, and do now and ever since said last-mentioned date have with-eld from plaintiff the possession of said land and premises, to his damage in the sum of twenty-five thousand dollars.

And plaintiff alleges that said land and premises are of the reasonable value of twenty-five thousand dollars.

And plaintiff further alleges that the reasonable value of the use, occupation, issue, and profit of said land and premises is the sum of twenty-five hundred dollars per annum, and that since defendants have dispos-ed plaintiff and with-eld from him the possession of said land and premises as aforesaid they have converted to their own use the rents, issues, and profits thereof and to plaintiff's damage in the sum of five thousand dollars.

Wherefore plaintiff prays that defendants be cited in terms of law to appear and answer this petition, and that on final hearing thereof he have judgement for title and possession of said land and
3 premises and for damages and for the value of the use and occupation and profits thereof, and for such other relief, both special and general, as he may be entitled to.

JONES & KENDALL &
W. M. SLEEPER,
Attorneys for Plaintiff.

Endorsed: No. 373. Edmund J. Hart *vs.* T. B. Cox *et al.* Original petition. Filed Sept. 3, 1888. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

This action is brought as well to try the title as for damages.

JONES & KENDALL &
W. M. SLEEPER,
Attorneys for Pl'tiff.

4 United States Circuit Court, Northern District of Texas, at Waco.

EDMOND J. HART
vs.
T. B. COX *et al.* } No. 373.

Now come defendants T. B. Cox and S. E. Echols and say they are not guilty of the wrongs, trespasses, and injuries alleged against them by plaintiff in his petition exhibited in this cause; and of this they put themselves upon the country.

T. B. COX,
For Self & S. E. Echols.

Endorsed: 373. Edmond J. Hart *vs.* T. B. Cox *et al.* Answer of defendants T. B. Cox & S. E. Echols. Filed Nov. 21, 1888. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

5 In the United States Circuit Court, Northern District of Texas, at Waco, November Term, 1888.

EDMOND J. HART
vs.
T. B. COX *et al.* } No. 373.

And now come D. E. Swim and S. L. Swim, defendants in the

above numbered and entitled cause, and in answer to the plaintiff's — filed herein say that they are not guilty of the wrongs and trespasses alleged against them in said petition; and of this they put themselves upon the country.

PEARRE & BOYNTON,
Attorneys for D. E. & S. L. Swim.

Endorsed: No. 373. Edmond J. Hart *vs.* T. B. Cox *et al.* Original answer of D. E. and S. L. Swim. Filed Nov. 21, 1888. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

6 In Hon. U. S. Circuit Court, Northern District of Texas, to November Term, 1888.

EDMOND J. HART
vs.
T. B. COX *et al.* } No. 373.

To the honorable judge of said court:

Your petitioner, Edmund J. Hart, hereinafter styled plaintiff, leave of the court being first had and obtained, files this his first amended original petition, amending his original petition filed in above styled and numbered cause on the 3rd day of September, 1888, and complains to your honor of T. B. Cox, Thomas Tinsley, S. E. Echols, D. E. Swim, S. L. Swim, and J. P. Williams, hereinafter styled defendants, and represents that plaintiff, Edmund J. Hart, is a citizen of and resides in parish of Orleans, State of Louisiana, and that defendants T. B. Cox, S. E. Echols, D. E. Swim, L. S. Swim, and J. P. Williams are citizens of the State of Texas and reside in the county of McLennan, in said State of Texas, and that the defendant Thomas Tinsley is a citizen of the Kingdom of Great Britain, and is temporarily residing in the city of New York, in the State of New York; and plaintiff further represents that on, to wit, the 1st day of January, 1886, he was, as he still is, the legal owner under a fee-simple title of that certain tract or parcel of land situate, lying, and being in the county of McLennan, in the State of Texas, and in the said northern district of Texas, described as follows, to wit: Beginning at the N. W. corner of a survey made for Ambrose Hall, thence N. 28 W. 556 varas, the N. E. corner of survey made for D. Faulkner; thence N. 62 E. at 356 varas, the S. E. corner of a survey made for M. L. Birdsall, from which an elm marked F bears N. 26 E. 34 varas, a willow marked H bears S. 89 E. 30 varas; thence N. 28 W. at 784, the
7 N. W. corner, a mound; thence N. 62 E. at 3,275 varas, the N. E. corner; thence S. 28 E. at 1,583 varas to the N. E. corner of the survey made for E. Yeaman; thence S. 62 W. at 1,637 varas, the N. W. corner of said Yeaman's survey; thence S. 28 E. at 427 varas, T. Thacker's N. E. corner; thence S. 62 W. 650 varas, said Thacker's N. W. corner on E. line of said A. Hall's survey; thence N. 28 W. with said Hall's line 670 varas, his N. E corner; thence S. 62 W. at 900 varas a branch of Cow bayou, at 1,344 varas the beginning, and being the same tract of land patented by the

State of Texas to the heirs of James Stewart on the 2nd day of July, 1849, by patent No. 379, volume 5.

And plaintiff alleges that on said last-mentioned day he was in possession of said lands and premises, and that afterwards, on, to wit, said 1st day of January, 1886, while plaintiff was in possession thereof as aforesaid, defendants unlawfully and with force of arms entered upon said premises and ejected plaintiff therefrom and dispossessed him thereof, and have ever since withheld & does still withhold from plaintiff possession of said premises, to his damage in the sum of five thousand dollars; and plaintiff alleges that said lands and premises are of the reasonable value of twenty-five thousand dollars.

And plaintiff further avers that since defendants have been unlawfully in possession of said premises as aforesaid they have used, occupied, and cultivated the same, & that the use and occupation thereof is of the reasonable value of twenty-five thousand dollars per annum, and that defendants during the time they have so used and occupied said premises have converted to their own use and benefit the rents and profits arising therefrom, to plaintiff's damage in the sum of five thousand dollars; and defendants T. B. Cox, S. E. Echols, D. E. Swim, & L. S. Swim having been heretofore served with citation in this cause, plaintiff prays that the other de-
8 fendants, Thomas Tinsley and J. P. Williams, be cited in terms of law to appear and answer this petition, and on final trial hereof he prays for judgment for title to said land and possession thereof and for his damages as aforesaid and for writ of possession, and such other relief, special and general, as he may show himself entitled to as in duty bound, &c.

JONES & KENDALL &
W. M. SLEEPER,
Att'ys for Plaintiff.

Endorsed: No. 373. Edmond J. Hart *vs.* T. B. Cox *et al.* 1st amended original petition. Filed Nov. 23, 1888. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

This action is brought as well to try title as *well as* for damages.

JONES & KENDALL &
W. M. SLEEPER,
Att'ys for Plaintiff.

9 In the Hon. U. S. Circuit Court, Northern District of Texas, at Waco.

E. J. HART
vs.
T. B. COX *et al.* } No. 373.

Now comes J. P. Williams, one of the defendants in the above styled and numbered cause, and waives the issuance of citation and service thereof as to himself and now here makes his appearance in court and files this his disclaimer, and says that he neither has or

claims any interest in the title to said land described in plaintiff's petition; that he is holding a portion of said land, to wit, that portion of the said James Stewart survey which lies west of the Lorena and South Bosque public road, under and by virtue of an assignment to him of a lease from defendant T. B. Cox to D. C. Aerl, now deceased, of date September 13, 1886, and he prays that all costs incurred by reason of this defendant being made a party to this suit be adjudged against said Cox.

J. P. WILLIAMS.

Endorsed: No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Appearance and disclaimer of defendant J. P. Williams. Filed Feb'y 21, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

10 E. J. HART }
vs.
T. B. COX *et al.* }

And now comes Thomas Tinsley, one of the defendants in the above-stated cause, and says he is not guilty of the wrongs, injuries, and trespasses or of either of them or any of them in manner and form as laid to this charge by plaintiff in his petition; and of this he puts himself upon the country.

THOMAS TINSLEY.

Endorsed: 373. E. J. Hart *vs.* T. B. Cox *et al.* Answer of Thomas Tinsley. Filed March 30, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

11 E. J. HART }
vs.
T. B. COX *et al.* }

Now comes T. B. Cox and S. E. Echols, defendants in the cause of E. J. Hart *vs.* T. B. Cox *et al.*, and suggest to the court that they have had adverse possession of the lands and premises in plaintiff's petition mentioned in good faith for more than one year next before the commencement of this suit, and that they have made permanent improvements thereon of the value of five thousand dollars as follows: dwelling-house and outhouses, $1,500; fencing, $1,500; putting land in a state of cultivation, $1,800; building tanks, wells, *and* etc., $200, during the time they had such possession of the same, and this they are ready to verify; wherefore they pray judgement for the value of said improvements as aforesaid.

T. B. COX,
Att'y for Self & S. E. Echols.

Endorsed: 373. E. J. Hart *vs.* T. B. Cox *et al.* Plea of valuable improvements. Filed April 17, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

12 In Circuit Court of the United States for the Northern District of Texas.

E. J. HART
vs.
T. B. COX *et al.* } No. 373.

Now comes the defendants Cox & Echols and say that they were served with citations in this cause on the 15th & 18th of October, 1888, respectively, and prior to the 1st day of November, 1888; that they answered on November 21, 1888, by original answer herein; that at the date of said answer the plaintiffs had on file only *their* original petition, filed herein Sept. 3rd, 1888; that on the 23rd of November, 1888, plaintiff filed *their* first amended original petition. Plaintiff's original petition describes the land sued for as having been located by virtue of certificat- No. 815, and in his amended petition as being granted by patent No. 379, vol. 5, on file among file papers in this cause, which shows it was located by bounty warrant No. 308; and the actual field-notes in the original and amended petition- differ in this, that the first in one of its allegations calls for a survey made for L. Faulkner. The second calls for D. Faulkner. In another allegation the first calls for N. 28 W. 484 varas to a mound, whereas the second calls to said mound at 784; again, the first calls for S. 62 W. 556 varas to east line of Hall, and in second at 650 varas to said line; again, the first calls for N. 28 W. 700 varas to N. E. corner of Hall, whereas the second calls for 670 varas in said call; again, the first calls at S. 62 W. from the last call 344 varas as a branch of Cow bayou—and, in all, 788 varas, to beginning, whereas the amended petition calls at S. 62 W. at 900 varas for said branch and 1,344 varas to place of beginning, and thereby describes

13 different and, affiant believes without calculation, more land is called for in the original petition and, to this extent, brings a new and separate cause of action herein as to which he has had no other and additional service, and he is ready to verify and prays judgment of the court.

Wherefore said Cox & Echols move the court to strike from the records said amended original petition of plaintiffs filed herein on November 23, 1888.

T. B. COX.

Sworn to and subscribed before me this the 19th day of April, 1889.

J. H. FINKS,
Clerk U. S. Ct, Northern District Texas,
By CHAS. H. LEDNUM, *Deputy.*

Representing D. E. and S. L. Swim, defendants, we adopt the above plea.

PEARRE & BOYNTON,
Att'ys for Swims.

Endorsed: No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Plea to strike out plaintiff's first amended petition. Filed Apr. 19, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

14 In Hon. U. S. Circuit Court, N. D. T.

EDMOND J. HART *vs.* T. B. COX *et al.* } No. 373.

Now comes plaintiff in the above cause and, leave of the court first being had and obtained, files this his first supplemental petition, and, excepting to the suggestion of improvements in good faith this day filed herein by the defendants T. B. Cox and S. E. Echols, says the same is insufficient in law because the same does not show that—

1st. Said defendants claim said land under claim of title.

2nd. That said plea does not show that said defendants claim under a warranty deed.

3rd. Because said plea does not show specifically the grounds upon which said claim of improvements in good faith is based; wherefore said plea should be stricken out, and of this they pray judgment of the court; and, answering said plea of improvement in good faith, if so required, plaintiff denies all and singular the allegations in said plea contained and demand strict proof of the same; and of this he puts himself upon the country.

JONES, KENDALL & SLEEPER.

Endorsed: No. 373. Edmond J. Hart *vs.* T. B. Cox *et al.* 1st supp. petition. Filed April 19, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

15 E. J. HART *vs.* T. B. COX *et al.* }

With leave of the court come the defendants and, amending their original answer filed herein on the — day of ——, file this their first amended answer; and now come defendants in the above-entitled cause and demur to plaintiff's petition, and say the same is not sufficient in law, and pray judgment of the court whether they shall be required to answer further in their behalf.

And if said defendants be required further to answer to plaintiff's petition they now come, by att'y, and defend the force and injury, etc., and say that they are not guilty of the said supposed wrongs and injuries and trespasses charged against them in plaintiff's petition or any or either of them in manner and form as the said plaintiff hath thereof above complained against them; and of this they put themselves upon the country.

And for further plea in this behalf the said defendants say that the said plaintiff ought not to have and maintain this aforesaid action against them, because they say that they have had and held peaceable and adverse possession under color of title from and under

the State of Texas of the lands and tenements in plaintiff's petition for more than three years next before the commencement of this suit; and this they are ready to verify; wherefore they pray judgement.

And for further plea in this behalf the said defendants say the said plaintiff ought not to have and maintain his aforesaid action thereof against them, because they say that they and those whose estate they have, claiming the same under deeds duly registered, have peaceable and adverse possession of the lands and tenements claimed in said plaintiff's petition, cultivating and using and enjoying the same and paying all the taxes due thereon for a
16 period of more than five years next before the commencement of this suit; and this they are ready to verify, etc.

And for further plea in this behalf the said defendants say that the said plaintiff ought not to have and maintain his aforesaid action thereof against them, because they say that, claiming to be the true and lawful owners of 1,200 acres of land lying in the county of McLennan, near the town of Lorena, bounded as follows, beginning at the N. W. corner of Ambrose Hall, thence N. 30 W. 640 varas to the N. W. cor. D. Faulkner, thence N. 60 E. 1,622 varas to cor. M. L. Birdsall, thence N. 30 W. 785 varas to stake in line of said Birdsall, thence N. 60 E. 3,460 varas to stake for corner, thence S. 31 E. 2,700 varas to N. E. corner E. Yeaman, thence S. 30 W. 1,635 varas for corner, thence S. 30 E. 427 varas for corner, thence S. 60 W. 650 varas to Ambrose Hall, thence N. 30 W. 700 varas to N. E. corner of Ambrose Hall, thence S. 60 W. 1,341 varas to beginning, they have had and held under color of title from & under the State of Texas peaceable and adverse possession of the lands and tenements above described for a period of more than three years next before the commencement of this suit; and, besides this, they are not guilty of any of said supposed wrongs, injuries, and trespasses in said plaintiff's petition complained of against them in manner and form as therein charged; all of which they are ready to verify.

And for further plea in this behalf said defendants come and deny all and singular the allegations in plaintiff's petition; and of this they put themselves upon the country.

T. B. COX,
EUGENE WILLIAMS,
(*For Tinsley*), *Att'ys for Defendants.*

17 E. J. HART
vs.
T. B. COX *et al.* } No. 373.

And defendant T. B. Cox suggests to the court that he and those under whom he claims have had adverse possession in good faith of 700 acres of the — controversy for and during the space of at least four years next before the commencement of this suit, which said 700 acres are described as follows: Beginning at the N. W. corner of the S. E. Echols 320 acres out of the James Stewart survey, patent No. 379, 1,030 varas S. 60 W. from the N. E. corner and N. W. cor-

ner, respectively, of the two James Stewart surveys, each patented for 960 acres, situated in McLennan county; thence S. 60 W. 2,400 varas to the east line M. L. Birdsall survey; thence S. 30 E. 784 varas to the S. E. corner said survey; thence S. 60 W. 162 varas, with south line of said Birdsall, to the N. E. corner D. Faulkner survey; thence S. 30 E. 700 varas to the N. W. corner Ambrose Hall survey; thence 1,344 varas to N. E. corner said survey; thence S. 30 E. 700 varas to N. W. corner Thatcher survey; thence N. 60 E. 650 varas to N. W. corner Erastus Yeaman survey; thence N. 30 W. 500 varas to N. W. corner S. E. Echols tract; thence N. 60 E. 600 varas to S. E. Echols' S. W. corner; thence N. 30 W. 1,740 varas to the beginning.

That he entered into the possession of the same in good faith under claim of title through warranty deeds duly of record in county court of McLennan county, with chain of title under said deed from the State of Texas; that he and those under whom he claims have made valuable improvements on said land, of the value of $6,300; that said improvements and there respective values are as follows:

	Tenement-houses and outhouses	$450 00
18	Water tanks	200 00
	Clearing, hauling, & destroying cactus	100 00
6 miles cedar posts & 4 & 5 wire fence		1,200 00
Putting in first-class state of cultivation 300 acres		2,400 00
Putting 400 acres in fine meadow condition for hay cutting and saving		1,800 00
Paying taxes		150 00
		$6,300 00

That said land without improvements is of the value of $15 per acre, or $10,500; that said land with the improvements aforesaid is of the value of $25 per acre, or the amount of $17,500.

That said defendant so entered into the possession of the premises aforesaid under warranty deeds with a chain of title back to the State of Texas, duly recorded as aforesaid; that he knew of no title or claim to said premises superior to his own, and that he verily beleived and does now beleive his claim of title under his deed as aforesaid the true and valid title to said land, & that he had no moral or legal reason to know or to beleive that any other person whatsoever held or claimed a legal or equitable title superior to his own; that def't continued in possession of said premises continuously under said claim of title, improving and paying taxes, for more than (5) five years before the filing of plaintiff's suit without adverse claim or interruption from any source whatever or in any manner whatsoever, and that in good faith under his claim of title as aforesaid he continued during said five years to make the improvements aforesaid without interruption or notice of any adverse claims to the title to said premises, and that he, so entering in
19 said lands in good faith, held the possession thereof, and during all said time made the improvements aforesaid; and this he is ready to verify.

Thereupon he prays judgment for the value of his improvements as aforesaid.

T. B. COX, *For Def'ts.*

E. J. HART
vs.
T. B. COX *et al.* } No. 373.

Defendant S. E. Echols comes, by attorney, and suggests to the court that he and those under him whom he claims have had adverse possession in good faith of 320 acres of the premises in controversy for at least three years next before the commencement of this suit; that said premises are bounded as follows: Beginning 640 varas N. 60 E. from the N. E. corner of the Thatcher survey, thence N. 60 E. 1,030 varas to the west line of the James Stewart survey, patent No. 380, thence, with the line between the two James Stewart survey-, N. 30 W. 1,740 varas to the N. E. & N. W. corners respectively of the said two Stewart surveys, thence S. 60 W. 1,030 varas with the north line of James Stewart survey No. 379, thence S. 30 E. 1,740 varas to the beginning; that he entered into the possession of said premises under claim of title by deeds duly recorded, and that he and those under whom he claims have made permanent and valuable improvements thereon during the time he has had possession as aforesaid, and that said improvements are of the value of $3,750; that said improvements and their values are as follows, to wit:

	Dwelling-house and outhouses	$1,000
	Cedar posts and wire fence, 3½ miles	600
	Tanks and wells	200
	250 acres put in best state of cultivation	1,750
20	75 acres prepared for hay meadows	225
		$3,750 00

That said premises without said improvements would be of the value of $15.00 per acre, or the sum of $4,800, & with said improvements are of the value of $27 per acre, or the amount of $8,640.00.

That said defendant so entered into the possession of the premises aforesaid under warranty deeds with a chain of title back to the State of Texas, which deed was duly recorded in McLennan county, Texas, and that defendant continued in possession of said premises under said deeds continuously for a space of five years next before the commencement of plaintiff's suit without interruption or adverse claim from any source, improving said premises as aforesaid all of said time and paying taxes thereon each year; and defendant avers that he did not know of nor was he advised of any adverse title or claim of title to said premises during all of said time, five (5) years, from any source superior to his own, and he verily believed his title good and effective against all others, and that there was no other valid title to said land from any source whatever.

And that he, so entering on said land in good faith, held the pos-

session of the same as aforesaid, and during all that time continued in good faith to make the improvements aforesaid; and this he is ready to verify. Therefore he prays judgements for the value of his improvements as aforesaid.

EUGENE WILLIAMS,
For Tinsley.
T. B. COX, *For Def'ts.*

E. J. HART
vs.
T. B. COX *et al.* } No. 373.

And for further plea in this behalf defendants Thomas Tinsley and T. B. Cox say that the plaintiff ought not to have and
21 maintain his aforesaid action against them as to seventy-two acres of the premises sued for, which said seventy-two acres are described as follows:

Beginning at the N. W. corner of Yeaman survey, thence S. 60 W. 650 varas to east line of Ambrose Hall survey; thence N. 30 W. 640 varas to the N. E. corner of said Hall; thence N. 60 E. 650 varas for N. E. corner of this at corner of fence; thence S. 30 E. 640 varas to the beginning, because they say that they and those under whom they claim have had and held peaceable and adverse possession under color of title from and under the State, and under deeds duly registered have held peaceable and adverse possession of said — and tenements, cultivating, using, and enjoying the same and paying taxes due thereon for a period of more than five years next before the commencement of this suit; and this they are ready to verify.

EUGENE WILLIAMS,
For Tinsley.
T. B. COX, *For Defendants.*

E. J. HART
vs.
T. B. COX *et al.* } No. 373.

Now come defendant- T. B. Cox and Thomas Tinsley, by attorney, and suggest to the court improvements in good faith, and say that they and those under whom they claim have had adverse possession in good faith of 72 acres of the land claimed by plaintiff, as set forth in his petition, for at least six years next before the commencement of plaintiff's said suit; which said seventy-two acres are described as follows, to wit: Beginning at N. W. corner of Erastus Yeaman survey, near Lorena, thence S. 60 W. 650 varas to Ambrose Hall east line, a corner; thence N. 30 W. 640 varas to N. W. corner said Hall; thence N. 60 E. 650 varas to stake corner of fence for N. E.
22 corner this; thence S. 30 E. 640 varas to beginning; that they entered into the possession of said premises under claim of title be deeds duly recorded in deed records of McLennan county, and that they and those under whom they claim have made permanent and valuable improvements thereon during the said time they

had possession as aforesaid before commencement of said suit, and that said improvements are of the value of seven hundred and fifty dollars, as follows:

House	$150 00
1½ miles cedar posts and wire fence	300 00
Pasture land and meadow	300 00
	$750 00

That said lands with the improvements *is* of the value of twenty-five hundred dollars, $2,500.00; that said lands without said improvements *is* of the value of seventeen hundred and fifty dollars, $1,750.00; that said defendants so entered into the possession of said lands under warranty deeds, and also a tax deed and execution deed, all of which were and are of record in McLennan county record of deeds; that defendants continued in possession of said land under said title continuously for six years next before the commencement of plaintiff's suit without interruption or adverse claims, paying taxes on said premises, and that they knew of no title superior to theirs, and that, so entering on said land in good faith as aforesaid, they made the improvements aforesaid; and this they are ready to verify. Wherefore they pray judgment for the value of their improvements as aforesaid.

EUGENE WILLIAMS,
For Tinsley.
T. B. COX, *For Def'ts.*

Endorsed: No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Defendants' first amended answer. Filed Nov. 27, 1889. J. H. Finks, clerk.

23 EDMUND J. HART *vs.* T. B. COX *et al.* } No. 373.

NOVEMBER 30TH, 1889.

This cause came on for trial on November 27th, 1889, and plaintiff and defendants appeared by counsel, and plaintiff announced ready for trial, and defendants announced that they were not ready and presented to the court their application for continuance, which application, being heard by the court, was overruled and the trial of the cause proceeded. Thereupon came a jury of good and lawful men, to wit, H. P. Davis and eleven others, who were duly empaneled and sworn to try the cause. The jury having heard the evidence, the argument of counsel, and having received the charge of the court, retired to consider of their verdict, and on November 30th, 1889, the jury returned into open court the following verdict, to wit:

"*Verdict of the Jury in the Case of Edmund J. Hart vs. T. B. Cox et als.*

"We, the jury in the case of Edmund J. Hart *vs.* T. B. Cox *et als.*, find, 1st, for the plaintiff the land in controversy, and we further

find that the defendant T. B. Cox has made valuable improvements on 700 acres of said land, the value of which *are* six thousand two hundred and fifty dollars, and the defendant S. E. Echols has made valuable improvements on 325 acres of said land, the value of which *are* three thousand seven hundred and fifty dollars; 2nd, we find the plaintiffs not entitled to rents; 3rd, we find the value of the lands held by defendants respectively, without the improvements thereon, to be as follows: T. B. Cox has 700 acres, valued at ten thousand five hundred dollars, and S. E. Echols 325 acres, valued at four thousand eight hundred and seventy-five dollars.

H. P. DAVIS, *Foreman.*"

24 It is therefore adjudged by the court that the plaintiff, Edmund J. Hart, do have and recover of and from the defendants, T. B. Cox, Thomas Tinsley, S. E. Echols, James P. Williams, D. E. Swim, and S. L. Swim, the title and possession of the lands sued for and described in plaintiff's petition, to wit: A tract of land situate in the county of McLennan, in the State of Texas, described as follows, to wit: Beginning at the N. W. corner of a survey made for Ambrose Hall, thence N. 28 W. at 556 varas, the N. E. corner of a survey made for D. Faulkner; thence N. 62 E. at 356 varas, the S. E. corner of a survey made for M. L. Birdsell, from which an elm marked F bears N. 26 E. 34 varas, a willow marked H bears S. 89 E. 30 varas; thence N. 28 W. at 784 varas, the N. W. corner, a mound; thence N. 62 E. at 3,275 varas, the N. E. corner; thence S. 28 E. at 1,583 varas, the N. E. corner of a survey made for E. Yeaman; thence S. 62 W. at 1,637 varas, the N. W. corner of said Yeaman's survey; thence S. 28 E. at 427 varas, T. Thacker's N. E. corner; thence S 62 W. 650 varas, said Thacker's N. W. corner on the E. line of said A. Hall's survey; thence N. 28 W. with said Hall's line 670 varas, his N. E. corner; thence S. 62 W. at 900 varas, a branch of Cow bayou; at 1,344 varas, the beginning, and being the same tract of land patented by the State of Texas to the heirs of James Stewart on the 2nd day of July, 1849, by patent No. 379, vol. 5.

It appearing to the court that the defendant James P. Williams has heretofore filed in this cause his plea, disclaiming any right, title, or claim in and to the land sued for by plaintiff, it is ordered by the court that said defendant James P. Williams do have and recover of and from the plaintiff his costs in this cause expended, for which let execution issue. It is further adjudged by the court that the defendant T. B. Cox is a possessor in good

25 faith of seven hundred acres of the land sued for by the plaintiff, described as follows: Beginning at the N. W. corner of the S. E. Echols 320 acres out of the James Stewart survey, patent No. 379, 1,030 varas S. 60 W. from the N. E. corner and N. W. corner, respectively, of the two James Stewart surveys, each patented for 960 acres, situated in McLennan county, thence S. 60 W. 2,400 varas to the east line of M. L. Birdsall; thence S. 30 E. 784 varas to the S. E. corner of said survey; thence S. 60 W. 162 varas with south line said Birdsall to the N. E. corner, the Faulkner survey;

thence S. 30 E. 700 varas to the N. W. corner Ambrose Hall survey; thence 1,344 varas to the N. E. corner of said survey; thence S. 30 E. 700 varas to N. W. corner Thacher survey; thence N. 60 E. 650 varas to N. W. corner Erastus Yeaman survey; thence N. 30 W. 500 varas to N. W. corner S. E. Echols tract; thence N. 60 E. 600 varas to S. E. Echols S. W. corner; thence N. 30 W. 1,740 varas to the beginning, and that said defendant T. B. Cox has made improvements on the said 700 acres of the value of six thousand two hundred and fifty dollars in excess of the value of the use and occupation thereof, and that the value of said seven hundred acres of land without regard to the improvements is ten thousand five hundred dollars. It is further adjudged by the court that the defendant S. E. Echols is a possessor in good faith of 320 acres of land, being part of the land sued for by plaintiff, and described as follows: Beginning 640 varas N. 60 E. from the N. E. corner of the Thacher survey, thence N. 60 E. 1,030 varas to the west line James Stewart survey, patent No. 380; thence with the line between the two James Stewart surveys N. 30 W. 1,740 varas to the N. E. and N. W. corners, respectively, of the said two Stewart surveys; thence S. 60 W. 1,050 varas with the north line of James Stewart survey No. 379; thence S. 30 E. 1,740 varas to the beginning, and that said defendant
26 S. E. Echols has made improvements in good faith on said 320 acres of land of the value of three thousand seven hundred and fifty dollars in excess of the value of the use and occupation thereof, and that said tract of 320 acres is of the value of four thousand eight hundred and seventy-five dollars without regard to the improvements thereon. It is further adjudged by the court that no writ of possession shall issue in this cause against the defendants T. B. Cox and S. E. Echols for said tract of seven hundred acres and said tract of three hundred and twenty acres, respectively, until the expiration of one year from the date of this judgment unless the plaintiff shall pay to the clerk of this court for the defendant T. B. Cox the sum of six thousand two hundred and fifty dollars, and to said clerk for the defendant S. E. Echols the sum of three thousand seven hundred and fifty dollars, with interest on said sums from this date.

It is further adjudged by the court that if the plaintiff shall neglect for one year from this date to pay said defendants Cox and Echols said sum, with interest as above provided, and if said defendants T. B. Cox and S. E. Echols shall within six months after the expiration of said year pay to the clerk of this court for the plaintiff, the said Cox the sum of ten thousand five hundred dollars and the said Echols the sum of four thousand eight hundred and seventy-five dollars, then the plaintiff shall be forever barred of his writ of possession as against said defendant or defendants so paying and from ever maintaining any action whatever against the said defendants T. B. Cox and S. E. Echols, respectively, their heirs or assigns, for the said above-described tracts of seven hundred acres and the said tract of three hundred and twenty acres.

It is further adjudged by the court that if said defendants T. B.

Cox and S. E. Echols shall not within six months after the
27 expiration of said one year, as above stated, pay to the clerk of this court the respective sums of $10,500.00 and $4,875.00 for the plaintiff as above provided, then writ of possession may issue in favor of plaintiff against said defendants Cox and Echols or against the defendant so failing for all the lands recovered by plaintiff in this action.

It is further ordered by the court that writ of possession may issue, as provided by law in ordinary cases, in favor of the plaintiff against all of the defendants for all of the land recovered by plaintiff in this action except the 700 acres adjudged to be held in good faith by defendant T. B. Cox and the 320 acres adjudged to be held in good faith by defendant S. E. Echols.

It is further ordered by the court that plaintiff have and recover of and from defendants T. B. Cox, Thomas Tinsley, S. E. Echols, D. E. Swim, and S. L. Swim all costs in this behalf expended, for which let execution issue, and that the officers of the court have execution against plaintiff and defendants for costs by them respectively incurred.

28 In U. S. Circuit Court, Northern District, at Waco.

E. J. HART
vs.
T. B. COX *et al.* } No. 373.

Now come the defendants and move the court to set aside the verdict returned into this court on the 30 day of November, and if judgment has been entered thereon to set aside such judgment and to grant a new trial, unless judgment is or will be rendered for the defendants, for the following reasons, to wit:

1. For the reasons fully set out in defendants' motion in arrest of judgment, which is referred to and made part hereof. See also bill of exceptions No. —.

2. The non-production of the original deed from Wm. H., Jno. T., and Catherine Stewart having been waived under the statute, a copy of the same was allowed in evidence for what it was worth as an ancient instrament without accounting for original at common law, as appears by bill of exceptions No. —.

3. The court erred in holding the plaintiff's said deed to be a link in defendants' De Cordova's title, claimed by the defendants to be a title through De Cordova by common source alone and as stated to be at the time the title deeds to De Cordova were introduced by defendants.

4. The court erred in holding the defendants estopped to attack said deed by affidavit of forgery. For all the evidence concerning said deed see bill of exceptions No. —.

5. The court erred in failing to submit to the jury a charge upon said deed, as requested by defendants in their requested instructions marked charge No. 1, and also erred in failing to instruct the jury to find for the defendants unless, by some evidence in addition to

age and custody of said deed, some act had been done freeing
29 the same from all just grounds of suspicions. See bill of exceptions No. —.

6. The court erred in not withdrawing from the jury the issue of the forgery of said deed. See bill of exceptions No. —.

7. The jury erred in finding the evidence sufficient to support a verdict for the plaintiffs in that, 1, the evidence more strongly identified survey No. 380 than 379 as the land referred to in the marshal's deed to E. J. Hart & Co.; 2, said evidence, at the most, left the issue equally well proven as to survey 379 as 380; 3, the only description tending to fix 379 as the one sold by the marshal's deed was the fact that this survey was described in the forged deed from Wm. H. & Jno. T. and Catherine Stewart to De Cordova; 4, because the description in the deed called for land lying on the Bull Hide and Cow Bayou streams, whilst the evidence showed survey No. 379 was not on either; 5, because if survey No. 379 was on the waters of those creeks called for in its patent, this does not mean that this was on the stream.

8. The court erred in failing to give charges 4, 5, 6, 7, & 8, and in failing to give each of them as requested by defendants. See bill of exceptions No. —.

9. The court erred in failing to give each of the instructions marked charge 9. See bill of exception- No. —.

10. The court erred in admitting the copy of the deed from Wm. H., Jno. T., and Catherine Stewart to De Cordova because the certificate of the purported commissioner was not sufficient to identify the purported grantors, but referred to them as described and professing to be the grantors, and, second, it did not state that the purported grantors had executed the same.

SCARBOROUGH & ROGERS.
30 T. B. COX, *For Self.*
EUGENE WILLIAMS, *For Tinsley.*

Endorsed: No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Motion for new trial. Filed Dec. 2, 1889. J. H. Finks, clerk.

31 In the Circuit Court of the United States for the Northern District of Texas, at Waco.

E. J. HART
vs. } No. 373.
T. B. COX *et al.*

To the honorable judge of said court:

Comes the plaintiff in the above styled and numbered cause and moves the court to set aside the verdict and judgment rendered herein on November 30th, 1889, and to grant him a new trial, for the following reasons:

1. Because the verdict of the jury is contrary to the law and evidence.

2. Because the jury, in their verdict, disregarded the charges of the court and the evidence adduced on the trial.

3. Because the verdict of the jury in assessing the value of the improvements in favor of the defendants T. B. Cox and S. E. Echols at the sum of $6,250 and $3,750.00, respectively, was not supported by any evidence adduced on the trial; and

4. Because said sums so awarded by the verdict to said defendants are greatly in excess of the values of the improvements as estimated by the witnesses who testified on that subject and are greatly in excess of the real value of the improvements.

JONES, KENDALL & SLEEPER,
Att'ys for Plaintiff.

Endorsed: No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Pl'tiff's motion for new trial. Filed Dec. 2, 1889. J. H. Finks, clerk.

32 In the Circuit Court of the United States for the Northern District of Texas, at Waco.

E. J. HART
vs.
T. B. Cox *et al.* } No. 373.

Comes the plaintiff and by leave of the court withdraws his motion for new trial heretofore filed in this cause.

JONES, KENDALL & SLEEPER,
Att'y- for E. J. Hart, Plaintiff.

Endorsed: No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Pl'tiff's withdrawal of motion for new trial. Filed Dec. 4, 1889. J. H. Finks, clerk, by C. A. Richardson, deputy.

33 In U. S. Circuit Court for Northern District of Texas, at Waco.

E. J. HART
vs.
T. B. Cox *et al.* } No. 373.

Come now the defendants T. B. Cox & S. E. Echols and moves the court to reform and amend the judgement herein rendered on, to wit, Nov. 30, 1889. This motion is made subject to defendants' motion for new trial & motion in arrest of judgement herein filed, and if said motions are by the court overruled, then defendants Cox & Echols pray that said judgment be so reformed and amended as to allow & direct execution to issue against plaintiff, E. J. Hart, as in judgments generally, and should this not be granted them to issue in the event he shall fail to pay these def'ts the amount awarded them by the court as improvements in good faith—that is to say, that in the event pl'tiffs shall fail to pay to def'ts said amounts within one year from the judgement, and def'ts should fail to pay to pl'tiffs the amount fixed by the judgement as the value of the land within six months from said time or the expiration of 18 months from the date of the judgment, and plaintiff should then under the law become entitled to his writ of possession, def't- Cox

& Echols pray that in that event they have execution on their judgment against pl't'ff for said amount, to wit, def't Cox for the sum of $6,250, with interest, and def't Echols for the sum of $3,750, with interest, and that said judgement be declared to be a lein on said land upon which the improvements are situated, on the lands of the pl't'ff.

Report submitted.

SCAROBOROUGH & ROGERS,
Att'ys for Def't- Cox & Echols.

Endorsed: No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Def'ts' motion to amend and reform judgement. Filed Dec. 4, 1889. J. H. Finks, clerk.

34 In the U. S. Circuit Court, Northern District of Texas, at Waco, November Term, 1889.

E. J. HART
vs.
T. B. COX *et al.* } No. 373.

Bill of Exceptions No. 1.

Be it remembered that on the call of the above cause for trial the plaintiff announced ready for trial, and defendants stated they could not safely go to trial at this term of the court, and presented to the court the following motions, to wit:

EXHIBIT A.

In Northern District of Texas, at Waco.

E. J. HART
vs.
T. B. COX *et al.* }

Now comes defendant Thomas Tinsley, *who* for himself and his codefendants, so far as they may claim the benefit of the continuance herein prayed for, and on oath says that there is on file among the papers of this cause a copy of a deed, of which the plaintiff has given the defendants notice, purporting to be the act and deed of Wm. H. Stewart, J. T. Stewart, and Catherine Stewart, purporting to convey the land described in patent No. 379, vol. 5, situated in McLennan county, Texas, of date 12 day of April, 1854, being the only deed or copy of deed which answers the above description. Affiant on oath further says that this is the deed through which the plaintiff claims chain of title to the sovereignty of the soil, and, further, that if the same is a forgery the plaintiff has no title to the land in controversey. Affiant further says that the only party or witness to said deed known to this affiant is Mrs. Catherine Stewart, one of the purported grantors in said purported deed, and,
35 further, that she is a resident of the city of Baltimore, and that her deposition is on file in this cause, taken by the plain-

tiff; that in said deposition the plaintiff does not ask any questions attempting to show the identity of said Mrs. Stewart as a grantor in said deed, or any question by which she is called upon or in answer to which she was put upon notice or could lawfully say that she did not execute the said deed. Affiant further says that he met and had a conversation with said Mrs. Stewart, said purported grantor, on Saturday, the 16th day of November, 1889, in the city of Baltimore, Md., during which conversation affiant by her statement was led to believe and does believe said deed to be a forgery, and that her evidence concerning the same will be material; that affiant at once left said witness in the city of Baltimore on said 16th day of November, and hastened to the city of Waco, arriving here on the 20th day of November, 1889, and as soon as he could after due consideration files this his motion for continuance in this cause, and represents that he has not nor would have had time since arriving here to do more than prepare papers and give the five days' notice necessary to take said Catherine Stewart's deposition before the trial of this cause, which is set for trial on November 27, 1889. Affiant further says that the testimony of said witness is material and he has used all diligence which he could use to advise his counsel of the facts, but the time between said conversation and the trial is too short to use any diligence further than to at once travel all the way from Baltimore to your honor's court to present the facts and enter this his first application for continuance.

THOMAS TINSLEY.

Sworn to and subscribed before me this 23rd day November, 1889.

36 [SEAL.] J. H. FINKS, *Clerk.*

Said above application being endorsed on its back as follows, to wit:

No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Pl'tiff's motion for continuance. Filed Nov. 23, 1889. J. H. Finks, clerk.

In the U. S. Circuit Court, Northern District of Texas, at Waco.

E. J. HART & Co. *vs.* T. B. COX *et al.* } No. 373.

Now comes Thomas Tinsley, a defendant herein, who on oath says that for himself and his codefendants he files this his first application for continuance, and represents that the testimony of the witness, Catherine Stewart and E. J. Hart, Jr., who are absent from your honor's court, is material, and defendants have an expectation of having it at the next term of the court; that said E. J. Hart, Jr., resides in the city of New Orleans, Louisiana, and said Catherine Stewart in the city of Baltimore, Maryland. Affiant further says that said Hart is a son (as he is informed and believes) of the plaintiff in this cause, and is unknown, except *except* upon slight introduction, to any of defendants and wholly unknown as to part of

these defendants; that heretofore the deposition of the plaintiff was taken by the defendants, hoping to prove the facts now hoped to be proven by said witness, E. J. Hart, Jr.; the plaintiff answered vaguely and stated no fact with certainty, which is expected can now be proven by said witness, E. J. Hart, Jr.; that inquirer in said depositions were made of said plaintiff, attempting to learn from him the agent's name or person now in custody of his books and papers from whom the said testimony could be had, and that said plaintiff failed to either state of his own knowledge or
37 disclose the name of the witness knowing the whereabouts of his papers and books and by whom facts concerning them could be had; that defendant did not know and could not know who was in possession of said evidence until about the 15th of this month, Nov., 1889, when interrogatories were presented to defendants' counsel by opposing counsel disclosing for the first time the name of such party as knew the facts expected to be proved by said witness, E. J. Hart, Jr.; that defendants, to accom-odate opposing counsel and to hasten the taking of said witness' deposition, waived time, notice, and such legal formalities as would tend to delay, and did all things likely to effect an early return of said depositions and propounded to said witness the necessary questions to elicit the testimony expected to be proven by said witness as aforesaid; that defendants are informed by opposing counsel that said interrogatories and crosses were by said opposing counsel forwarded to the said witness', E. J. Hart, Jr., place of residence, and affiant presumes were properly enveloped, addressed, and stamped and mailed to an officer authorized to take the same, on or about the 16th of this month, as stated by opposing counsel, to do which said interrogatories were entrusted to said counsel, and defendants have reason to believe the same was done.

That eleven days have transpired and said depositions have not been returned into this court. Affiant further states that the said interrogatories so at once crossed as aforesaid *was* the only and first information of the fact that said Hart, Jr., knew all the facts to which defendants expect him to testify, and used the earliest and greatest diligence to procure his testimony at this term of the court, and the*ir* was sufficient time from the 16th of this month until now for the forwarding, taking, and returning of the papers neces-
38 sary to said depositions. Defendants state that they expect to procure the testimony of said witness at the next term of the court, and defendants attach hereto the affidavit of affiant heretofore filed in this cause on the 22nd day of November, 1889, and pray that same be taken as a part of this application for continuance, the same being attached hereto and identified as Exhibit A.

THOMAS TINSLEY.

Signed and sworn to before me this Nov. 27, 1889.

J. H. FINKS, *Clerk.*

(Endorsed on back of the last:)

No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Application for continuance. Filed Nov. 27, 1889. J. H. Finks, clerk.

Which, being heard, the court overruled; to which ruling the defendants did then and there in open court except.

Allowed in open court.

Jan'y 9th, 1890.

A. P. McCORMICK,
U. S. Dist. Judge.

Bill of Exceptions No. 2.

Be it further remembered that the plaintiff offered in evidence a certified copy of what purported to be a deed now of record on the deed books of the clerk's office of McLennan county, hereinafter copied into this bill. The same has on copy introduced in evidence no scroll or evidence of any char-ter showing that the commissioner, E. R. Sprogue, affixed to the original his seal. As to this deed the defendants more than three days before the trial filed an affidavit of forgery, stating therein that the defendants beleived the deed to be a forgery, which affidavit is heretofore copied in bill of exceptions No. 1.

39 The defendants excepted to the sufficiency of the certificate to said deed because it failed to show that the purported grantors appeared before the commissioner, the latter certifying that persons, naming them, described and professing to be *to be* the grantors appeared before him. It was offered as an ancient instrument, the paper offered being the said copy from the records of *the* McLennan county. Said deed, as shown by said copy, reads as follows:

James Stewart, heirs of.
to
J. De Cordova.

This indenture, made and entered into this twelfth day of April, in the year of our Lord one thousand eight hundred and fifty-four, between William H. Stewart and Catherine, his wife, and John Thomas Stewart, sons and only heirs-at-law of James Stewart, deceased, of the city of Baltimore and State of Maryland, of the first part, and Jacob De Cordova, of the city of Austin and State of Texas, of the second part, witnesseth:

That the said William H. Stewart and John T. Stewart, parties hereto of the first part, for and in consideration of the sum of one hundred dollars to them in hand paid by the said Jacob De Cordova, party of the second part to these presents, the receipt whereof is hereby acknowledged, have granted, bargained and sold, aleined and enfeoffed, and conveyed, and by these presents do grant, bargain & sell, alein, enfeoff, and convey, unto him, the said Jacob De Cordova, his heirs and assigns forever, nine hundred and sixty acres of land situated and being in Milam district, on the waters of Bull Hide creek and Cow bayou, beginning at the northwest corner of a survey made for Ambrose Hall, thence north twenty-eight degrees west, at five hundred and fifty-six varas the northeast corner of a survey made for D. Faulkner; thence north sixty-two degrees east,

at three hundred and fifty-six varas the southeast corner of
40 a survey made for M. L. Bardsall, from which an elm marked F. bears north twenty-six degrees east thirty-four varas, a willow marked H. bears south eighty-nine degrees east thirty varas; thence north twenty-eight degrees west, at seven hundred and eighty-four varas to the northwest corner of a mound; thence north sixty-two degrees east, at three thousand two hundred and seventy-five varas the northeast corner; thence south twenty-eight degrees east, at fifteen hundred and eighty-three varas to the northeast corner of a survey made for E. Yeaman; thence south sixty-two degrees west, at sixteen hundred and thirty-seven varas the northwest corner of said E. Yeaman survey; thence south twenty-eight degrees E., at four hundred and twenty-seven varas F. Thatcher's northeast corner; thence south sixty-two degrees west, at nine hundred varas a branch of Cow bayou, at thirteen hundred and forty-four varas to the place of beginning the above-described lands being the same which *was* granted to the heirs of James Stewart, deceased, by virtue of bounty land warrant No. 308, issued to James Stewart by William G. Cook, adjutant general, under a patent from the State of Texas, No. 379, issued from the general land office upon the twenty-eighth day of February, one thousand eight hundred and fifty-four, as by reference thereunto had will more fully — at large appear; to have and to hold the said herein-described land and premises, with the appurtenances thereunto belonging, unto the said Jacob De Cordova, his heirs and assigns, to the only proper use of the said Jacob De Cordova, his heirs and assigns forever.

In testimony whereof the said William H. H. Stewart and Catherine, his wife, and John T. Stewart hereunto set their hands and seals on the day and year first hereinbefore written.

41 WILLIAM H. STEWART. [SEAL.]
CATHERINE STEWART. [SEAL.]
JOHN T. STEWART. [SEAL.]

Signed, sealed, and delivered in presence of—
HENRY R. ROOT.
L. WERNT.

STATE OF MARYLAND, }
City of Baltimore. }

Be it remembered and it is hereby certified that on this twelfth day of April, in the year of our Lord one thousand eight hundred and fifty-four, before me, the subscribed commissioner of deeds for the State of Texas, resident in the city and State aforesaid, duly commissioned and qualified, personally appeared William H. Stewart and Catherine, his wife, and John T. Stewart, well known to me to be the individuals described as and professing to be the parties of the first part to the foregoing deed or indenture, and then and there acknowledged the same to be their respective act and deed, and the said Catherine, being by me examined out of the presence & hearing of her husband *stated* she doth execute the same freely and voluntarily and without being induced to do so by fear or threats of

or ill usage by her husband or by fear of his displeasure, answereth and saveth that she doth.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, at the city of Baltimore and State of Maryland aforesaid, on the day and year above written.

E. R. SPRAGUE,
Commissioner of the State of Texas.

Filed for record 8th day of May, at 3 o'clock p. m., A. D. 1854.
Recorded 10th day of May, at 2 o'clock p. m., A. D. 1854.

42 To its introduction the defendant objected:

1. That it could not be introduced under the statute, because—

1st. There was on file an affidavit of forgery.

2nd. That the certificate did not show the grantors, purporting to execute the instrument, acknowledged that they had executed the same, which the statute then required, nor did it show that the officer knew more of the parties than that they were described as and professed to be the parties bearing the names signed to the instrument, and failed to identify them as being the parties, nor show any seal of office.

2. That said copy could not be introduced as at common law as an ancient instrument, because—

1st. There was no proof of loss or proof of showing search for or any effort to find or account for the original as at common law, this proof being different from the simple requirements under the statute to admit certified copies. The plaintiff offered in evidence the following agreement as being sufficient to relieve him from such proof:

E. J. Hart & T. B. Cox.

We agree that all title deeds in chain of title of plaintiffs and defendants or certified copies thereof—originals and copies of patents relating to the survey in question & adjoining surveys—may be introduced under the statute without filing notice or accounting for originals.

Nov. 23, 1889.

JONES, KENDALL & SLEEPER,
Att'ys for Plaintiff.
EUGENE WILLIAMS, *For Tinsley.*

Filed Nov. 27, 1889.

J. H. FINKS, *Clerk.*

43 2nd. Defendants objected that they were not bound by this agreement and that it related to the "filing, notice, or accounting for originals under the statute and not to the more exacting demand of the common law as to proof of loss or accounting for the original in case of an attack on an instrument for forgery, and especially did this agreement not waive the proof of a search for the instrument charged to have been forged, this search not being

required to be proven to introduce a certified copy under the statute, but being a strict requirement at common law.

3rd. That the file-mark of the clerk in 1854 might prove the age and custody of the copy within the requirements of the rule governing ancient instruments, but that there was no proof of any act of possession, payment of taxes, act of ownership, or other act of any character under the deed to give evidence of its genuineness or to remove suspicion from it.

This third objection the court decided to pass upon at this stage of the trial and held open his opinions until the plaintiff should introduce further testimony.

The other objections of the defendants the court overruled; to which ruling of the court the defendants did then and there in open court except.

Allowed in open court Jan'y 9th, 1890.

A. P. McCORMICK,
U. S. Dist. Judge.

Be it remembered that on the trial of this cause plaintiff offered in evidence the following deed:

THE STATE OF TEXAS, }
McLennan County. }

Know all men by these presents that whereas Edmond J. Hart, Isaac N. Marks, and Barnett B. Hart recovered a judgement
44 for the sum of one thousand and sixty-one dollars and fifty cents, debt, and the further sum of *of* forty-eight dollars and twenty cents for costs against one J. De Cordova in the district court of the United States for the eastern district of Texas, sitting at Galveston, on the 24th day of March, A. D. 1856, upon which an execution issued (pluries) May the 11th, 1858, which came to my hands as marshal of the western district of Texas on the 1st day of August, 1858, and there not being personal property of the said J. De Cordova to satisfy said execution, I levied the same on the 16th day of August, 1858, on a certain tract or parcel of land as the property of said J. De Cordova, containing by estimation eight hundred and ninety-eight acres (898) of land, lying in Milam land district and county of McLennan aforesaid, on Cow bayou & Bull Hide — streams patented to the heirs of James Stewart for (960) nine hundred and sixty acres, and after having advertised and given notice according to law for twenty days I did offer the said tract of land at public sale, at the court-house door of McLennan county, on the 7th day of September, A. D. 1858, being the first Tuesday of the month, agreeably to said advertisements and notice, and the said plaintiffs being the highest bidders the same was struck off to them at the price of two hundred and ten dollars ($210). Therefore, in consequence of the premises, I do transfer and convey to the said plaintiffs, Edmond J. Hart, Isaac N. Marks, and Barnet B. Hart, their heirs and assigns forever, all the right, title, and interest of the said Jacob D. Cordova to the said tract of land of eight hundred and ninety-eight acres for the consideration of two hundred & ten dol-

lars as aforesaid; to have and to hold the same unto the said plaintiffs, their heirs and assigns, forever, in as full and ample a manner as I, as marshal aforesaid, can or ought to convey the same, but no further or otherwise.

45 This 7th day of September, A. D. 1858.

Witness my hand and scroll for seal.

WM. C. YOUNG, [SEAL.]
U. S. Marshal, W. D. Texas,
By J. A. ECHOLS, *Deputy.*

To the introduction of which deed defendants objected for the following reasons, to wit: First, because the same contains no sufficient description of any lands by which it can be identified, nor does the same refer to any instrument of writing in aid of the defective descriptions; sec., if the expressions in said deed patented to the heirs of James Stewart is to be taken as a reference to any patent which can be looked to in aid of said defective description, we are unable to determine which patent is referred to; 3rd, the record in this cause at the time this objection was made disclosed the fact that on the same day, July 2, 1849, there were issued to the heirs of James Stewart two patents, each for 960 acres of land situated in McLennan county, adjoining each other, the one on Bull Hide creek and the other on the waters of Bull Hide creek and Cow bayou, as follows:

Patent No. 380. Vol. 5.

Grant to the heirs of James Stewart, dec'd, their heirs and assigns forever, nine hundred and sixty acres of land situated and described as follows: In Milam district, on Bull Hide creek, about eleven miles S. W. by S. from the Waco village, by virtue of bounty warrant No. 308, issued by William G. Cook, adjutant general, on the 9th day of August, 1847, etc.

Done at the city of Austin on the second day of July, in the year of our Lord one thousand eight hundred and

46 forty-nine.

GEO. T. WOOD, *Gove-nor.*
GEO. W. SMITH,
Com'r G'n'l L'd Office.

Patent No. 379. Vol. 5.

Grant to the heirs of James Stewart, dec'd, his heirs and assigns forever, nine hundred and sixty acres of land, situated and described as follows:

In Milam district, on the waters of Bull Hide creek and Cow bayou, about 12½ miles S. W. from Waco village, by virtue of bounty warrant No. 308, issued to James Stewart by Wm. G. Cook, adjutant general, on the 9th day of August, 1847, etc.

Done at the city of Austin on the second day of July, in the year of our Lord one thousand eight hundred and forty-nine.

GEO. T. WOOD, *Gove-nor.*
GEO. W. SMITH,
Com'r G'n'l Land Office.

There was on file among the papers a report of Surveyor Turner, showing the location of these two surveys.

This survey was made by Turner under order of the court, and showed the locations in compliance with the order of the court.

This report was not objected to by either party, and constituted a record of the court in this cause.

The following map was shown by the testimony of Fauntley Johnson, one of the defendants' witnesses, to be a correct draft from the report of Turner, showing the location of the two surveys, and conflicts with the eastern Stewart No. 380, the boundary of the surveys being shown as called for in the patents so far as the locations thereof on the ground as made in Turner's report.

47 The proofs all tended to show that the water falling on a portion of the west James Stewart survey No. 379, the land in controversy, flowed into Bull Hide creek, and that falling on the other portion of said survey flowed into Cow bayou.

(Here follows map marked p. 47*a*.)

Of these facts and this record and the following map the court will take judicial knowledge, and, unaided by extrinsic evidence not referred to in said deed, the description in the said marshal's deed wholly fails to so describe any land that the same can be identified; all of which objections were by the court overruled, and said deed permitted to go to the jury.

To which ruling of the court the defendants then and there excepted, and here and now tender their bill of exceptions and pray the same be signed and filed and made a part of the records of this cause.

Allowed in open court Jan'y 9th, 1890.

A. P. McCORMICK, *Dist. Judge.*

Bill of Exceptions No 4.

Be it remembered that on the trial of this cause, after plaintiff had rested his case, defendants moved to exclude the U. S. marshal's deed as set out in bill of exceptions number 3, for the reasons (1) it gives no sufficient description on its face of any land that might be identified.

(2) It shows upon its face that it describes, if any, land lying upon two streams, whereas the land as described in plaintiff's petition lies on the waters of the two streams and not on the creeks or streams themselves, thereby showing a variance, the expres-

48 sion waters meaning the tributaries draining the surrounding country into the creeks or streams and not the streams themselves, the tributaries covering a large scope of country, said expressions having different and well-defined meanings.

(3) It is confessed by the plaintiff that the deed itself does not describe any lands, and that the patents, if any, to the heirs of James Stewart must be consulted for description; but the deed itself does not by its terms refer to any particular patent, professing to

make such patent a part of the deed for description, and unless this is done no patent can be consulted. The expression "patented" is not equivalent to "See the patent to the heirs of James Stewart for description."

(4) If the expression "patented," etc., were equivalent to "See the patent," etc., yet no specific patent by number, date, or otherwise is described or referred to, and it would require a search through the land office to find a patent to describe the land, rather than *on* a search on the ground to find land to satisfy the field-notes of a certain patent, and, unless identified by the deed, the patent cannot be looked to for a deed made under forced sale for the description of the land sold.

(5) But *their* are two patents to the heirs of James Stewart, of which judicial knowledge must be taken by the court, because the patents are public grants and because the report of the surveyor, Stephen Turner, appointed by the court to make a survey and report the same back to this court, *it* is before the court, which report shows there are two patents to the heirs of James Stewart of land in McLennan county, each for 960 acres, and the marshal's deed does not by any expression or reference contained therein shows which of the two is meant or in any manner identify the particular patent.

49 (6) If the courts should not take judicial knowledge of the two patents, yet it is apparent the marshal's deed does not attempt to describe any patent.

(7) If there be vagueness or uncertainty in words or terms of art used in a deed made to property under forced sale, the words used or terms of art may be explained or the vagueness of the face of the instrument interpreted by those expert in such terms, &c.

When so explained and interpreted, the deed must describe the lands.

The terms used in this deed (marshal's deed) need no interpretation or explanation, yet fail to identify not only any land, but also any patent, and it is clear from the face of the instrument itself that extrinsic evidence would be required to identify what was intended to be referred to by the deed, as well as to identify the land itself.

(8) The marshal's deed uses no other words attempting to describe the patent than the expression "patented to the heirs of James Stewart for 960 acres."

It refers to the land lying on Cow bayou and Bull Hide creek streams, but it was never intended from all the patents in the land office a certain patent should be selected containing these words.

If the patent was intended to be referred to at all it should be so described as to be selected by the purchaser irrespective of the location of the lands, and when the patent was found it might be taken and from its field-notes a certain tract of land be located on Cow bayou and Bull Hide streams. The patent itself is not better identified by the use of the expression "on Cow bayou and Bull Hide streams" than if said expression had not been used. The said

50 marshal's deed makes reference, if at all, to the patent only by the use of the words "patented to the heirs of James

Stewart for 960 acres;" and if this be a reference to any record for any instrument it is too general as a reference for description of property sold under forced sale and attempted to be conveyed by a marshal's deed.

Which motion was by the court overruled; to which ruling defendants then and there excepted, and here and now tender this their bill of exception, and pray the same be signed and filed and made a part of the record of this cause.

Allowed in open court Jan'y 9th, 1890.

A. P. McCORMICK,
U. S. District Judge.

E. J. HART
vs.
T. B. COX *et al.* } Bill of Exceptions No. 5.

Be it remembered that on the trial of the above styled and numbered cause plaintiff introduced in evidence the following title deed:

1st. A copy of patent No. 379, vol. 5, wherein is granted to the heirs of James Stewart by the State of Texas the land described in plaintiff's petition.

2nd. Proof by Mrs. Catherine Stewart's deposition that William Stewart and John Stewart were the only heirs of James Stewart on April the 12th, 1854, and that Wm. H. Stewart and John T. Stewart are dead and Mrs. Catherine Stewart survives them.

3rd. A certified copy from the clerk's office of McLennan county of a deed purporting to be a deed of Wm. H. Stewart, John Stewart, and Catherine Stewart, wife of Wm. H. Stewart, to J. De
51 Cordova, dated April 12, 1854, conveying to said De Cordova the land granted by said patent No. 379, vol. 5, being the same deed introduced by plaintiff and objected to by defendant-, as shown in bill of exceptions No. 2.

As to this deed defendant- claimed that the affidavit for continuance by def't Thos. Tinsley, heretofore set out in bill of exceptions No. one, was an affidavit of forgery, there being no other affidavit of forgery in the records, and the said deed before the court as an ancient instrument at the time this bill of exceptions was taken, subject to the ruling of the court as to their being evidence of any act shown under it such as would permit it to be submitted to the jury under proper charges from the court as to the law of ancient instruments.

4th. The original of a deed from the U. S. marshal of the western district of Texas to Edmond J. Hart, Barnett B. Hart, and Isaac N. Marks by virtue of an execution issued on a judgment in favor of said grantees against J. De Cordova, conveying as the property of said De Cordova such land, if any, as said deed described, claimed by the plaintiff to be the land in controversy and by the defendants not to be the land held by them. (For full text of this deed see bill of exceptions No. 3.)

5th. A deed by B. B. Hart to E. J. Hart, of date July 30, 1874,

conveying to E. J. Hart all his right, title, and interest in the partnership property, including real estate and personal property and assets of all and every description.

6th. A deed by I. N. Marks to E. J. Hart, of date August 19, 1874, conveying to said E. J. Hart all real estate in the State of Texas or elsewhere.

7th. For the purpose of showing a common source of title with defendant under J. De Cordova plaintiff introduced—

1st. Deed from L. B. Davis, administrator of the estate of
52 J. De Cordova, deceased, to T. B. Cox, of date May 29th, 1884, purporting to convey 960 acres of land patented to the heirs of James Stewart by the State of Texas by patent No. 379, vol. 5, and being the same land described in plaintiff's petition and sued for by him.

2nd. Deed from T. B. Cox to defendant Thomas Tinsley, of date December 31, 1884, conveying an undivided half interest in the land in controversy.

3. Deeds of Cox and Tinsley to defendant S. E. Echols, of date 4th of September, 1885, conveying to him 320 acres of the land in controversy.

Defendants introduced in evidence an original of a deed from Mrs. Catherine Stewart, Mrs. Fannie Finnerson, joined by her husband, Wm. H. Finnerson; Virginia Sexton, and Josh. H. McAllister to the defendants Cox and Tinsley, acknowledged in due form before a notary public in Baltimore November 16th, 1889, conveying to the grantees therein the land described in patent number 379, volume 5, the land in controversy.

Defendants introduced the deed of L. B. Davis, administrator of the estate of J. De Cordova, to defendant T. B. Cox, of date May 29, 1884, conveying the land in controversy, being the same deed previously introduced by plaintiffs to show common source, for the purpose of showing in themselves the defendant's title and good-faith improvements made on the land since defendant had had possession thereof.

3. Deed from T. B. Cox to Thomas Tinsley, conveying an undivided half of said land, of date Dec. 31, 1884.

4. Deeds from Thomas Tinsley and T. B. Cox to S. E. Echols, of date Sept. 4, 1885, conveying to him 320 acres of said land.

After the above and all the evidence had been introduced and plaintiff's counsel had closed his opening argument defend-
53 ants' counsel moved the court to exclude from the jury the said copy of said deed from Wm. H., John T., and Catherine Stewart to J. De Cordova for the following reasons:

1st. The same could not be considered as proven under the statute because of the affidavit of forgery.

2. It was not proven as an ancient instrument, because no act of possession, payment of taxes, or other act had been done by any claimant under said deed or any one else to free it of just grounds of suspicion or to lead the minds of the jury or court to a conclusion of its genuineness, nor was there any accounting for the ab-

sence of the seal from the certificate of E. R. Sprague, the commissioner before whom it purported to have been executed.

3rd. There was no evidence of execution of the deed by any character of evidence showing at common law its execution as required by the plaintiff by the affidavits of forgery.

This motion the court held open until defendants' counsel had closed his argument to the court and jury.

And when said argument of defendants' counsel had been closed the court, passing upon said motion of defendants, overruled the same, holding that, the plaintiff having shown a common source of title with defendants from J. De Cordova, and defendants themselves having introduced in evidence a deed from L. B. Davis, the administrator of J. De Cordova, to T. B. Cox to show title in themselves, — were estopped from denying the validity of the said deed from the heirs of James Stewart to said J. De Cordova, and that when plaintiff showed a common source of the title with the defendants, if plaintiff's title under the common source was the superior title, the burden of proof was shifted on defendants to prove any fact that would defeat
54 plaintiff's right to recover; to which ruling of the court defendants objected for the reasons—

1st. That they did not claim under this purported deed from Wm. H., John T., & Catherine Stewart to De Cordova, of date April 12, 1854.

2nd. That their claim of title and good-faith improvements under De Cordova did not imply any claim or admission that De Cordova title came through this deed.

3rd. That the defendants not only do not claim under this deed, but before the trial filed an affidavit of forgery, attacking its genuineness, and brought up the outstanding title in the heirs of Stewart in defiance of this pretended title from Wm. H. Stewart.

4th. The title through Mrs. Stewart, of Nov. 16, 1889, is the superior title until some other title is shown superior to it, which burden of proof is thrown upon the plaintiff by the affidavit of forgery.

5th. The affidavit of forgery is statutory and affects the method of proof by which the plaintiff may establish his title and place the burden upon him by the plain letter of the law irrespective of the doctrine of esstoppel, with which is has no connection.

6th. But if the doctrine is invoked the estoppel would work only to prevent the defendants from claiming any right under this deed of April 12, 1854, and not to prevent the attack upon it by reason of the defendants' claim of title and good faith by virtue of the De Cordova title, which the defendants claim under.

All of which objections the court overruled; to which ruling of the court defendants did then and there in open court except and still does except, and here now tender their bill of exceptions and pray that the same be signed and filed and made a part of the records of this cause.

55 Allowed in open court as corrected and fixed by the judge, the counsel failing to agree, Jan'y 9th, 1890.

A. P. McCORMICK,
Dist. Judge.

Bill of Exceptions No. 6.

Be it remembered that on the trial of this case and after the plaintiff's opening argument and the defendants' whole argument to the jury had been made and when the plaintiff's counsel arose to conclude the argument the court suggested to plaintiff's counsel in open court from the bench and in hearing of the jury that no proof of any act or assertion of ownership under the deed of the heirs of James Stewart to De Cordova had been offered; that such proof was necessary to entitle it to be considered as an ancient instrument, and that, such being the court's view of the state of the proof, the plaintiff's counsel could only elect to take a nonsuit or submit to have a verdict directed for the defendants, when the plaintiff's counsel announced that the plaintiff would have to submit to have the court direct a verdict for the defendants; and thereupon the court directed the jury to find a verdict for the defendants, and directed the clerk to prepare a verdict and any member of the jury to sign it as foreman, the jury remaining in the box. While this was being done, on a suggestion of plaintiff's counsel that they be given further time to advise themselves whether they could safely elect to take a nonsuit, the matter was suspended by direction of the court until after the noon recess, the hour for which had then arrived; and, at the reassembling of the court after the noon recess, the jury being
56 in the box, the court announced to counsel for both parties in open court from the bench and in hearing of the jury that, on further consideration during the recess of the position taken by plaintiff's counsel at an earlier stage of the trial, that where a common source was shown a party could not go back of the common source to impeach a deed for forgery, was well taken, and that the defendants, having themselves offered the deed from De Cordova's administrator to Cox and from Cox to Tinsley and from both to Echols, were concluded on the question of common source and estopped to deny the genuineness of the deed from James Stewart's heirs to De Cordova, or it was immaterial whether said deed was genuine or not; and thereupon defendants' counsel was permitted to resume his argument to the jury, and when the plaintiff's counsel had concluded the argument to the jury the court charged the jury as to the title as shown in the bill of exceptions No. 8; to which ruling of the court and proceedings of the trial the defendants, by their counsel, excepted at the time on the following grounds, to wit:

1st. The court had already correctly held that there was no evidence upon which the Stewart deed to De Cordova, of date April 12, 1854, could be submitted to the jury as an ancient instrument, and this ruling placed the title in the defendants as a matter of law, which the court had already correctly charged.

2nd. The argument had been closed, the plaintiff had been given the privilege of nonsuit, which he had declined and had requested a verdict, and the court had charged the jury, and the verdict had

been signed by the foreman, which became the verdict of the jury, which the court had no power to disturb by a subsequent charge.

3rd. Such proceedure would tend to confuse and mislead the jury; which objection the court overruled, and to which ruling the
57 defendants did then and there in open court except, and now here in open court tender this their bill of exceptions and pray that it be allowed, signed, and made part of the records; which is accordingly done this the 9th day of January, 1890, in open court.

The counsel failing to agree, the foregoing bill was settled by the judge.

A. P. McCORMICK,
U. S. District Judge.

Bill of Exceptions No. 7.

Be it remembered that on the trial of this cause the defendants' counsel requested the following charges, to wit:

Charge No. 1.

United States Court, at Waco.

E. J. HART
vs. } 373.
T. B. COX *et al.*

GENTLEMEN OF THE JURY: You are instructed that a copy of a deed is submitted to you purporting to have been executed by Wm. H. Stewart, Catherine Stewart, and John Stewart, the heirs of James Stewart, deceased.

The plaintiff, E. J. Hart, claims by this deed that the title to the land described in his petition passed out of the heirs of Stewart upon the date it purports to bear date. The defendants have filed an affidavit charging this deed to be a forgery.

This affidavit place- upon the plaintiff Hart the burden of proving the original of this paper to have been genuine paper executed by said heirs.

The plaintiff introduces no direct evidence that the heirs of Stewart executed the original of this paper, but seeks to show its genuineness by presenting this copy as an ancient instrument, and
58 upon this you are charged that if you believe the copy in evidence came from the proper custody and is thirty years of age (both of which the defendants admit to be true), then you will look to all the evidence, and if you find that De Cordova or the plaintiff or any one else claiming under either of them at the time (of the doing) took possession of the land or did any other act which in your opinion is sufficient to lead your mind to the conclusion that the original of this copy was a genuine document, such evidence would dispense with the necessity on the part of the plaintiff Hart of proving the execution of the said original.

2.

And you will find the same to have been a genuine document, and, if so, it would pass the title to the land out of the heirs of Stewart. But unless you find from the evidence that De Cordova or Hart or some one else claiming under them or either of them did some act, such as taking possession of the land or using it, or some other act in your opinion sufficient to lead your mind to the conclusion that the original of this copy was a genuine document, you will find said deed to be a forgery.

WILLIAMS.

Charge No. 4.

The burden is on the plaintiff, E. J. Hart, to identify the land refer-ed to in the marshal's deed to the firm of E. J. Hart & Co., and unless same is identified and shown by the evidence to be the land held by the defendants you will find for the defendants.

WILLIAMS.

59 Charge No. 5.

If you find from the evidence that the land described as the eastern Stewart survey, patent No. 380, vol. V, will satisfy the description contained in said marshal's deed, you will find for the defendants.

WILLIAMS.

Charge No. 6.

If you find the descriptions of the land as contained in the marshal's deed will be satisfied by the description in one of the said patents as well as the other, you will find for the defendants.

WILLIAMS.

Charge No. 7.

If, after considering the patents, maps, and all the evidence, you will find yourself in such doubt that you cannot with reasonably certainty decide which survey, if either, was sold by the marshal, you will find for the defendants.

WILLIAMS.

Charge No. 8.

The burden of proof is on the plaintiff to show superior title to the land described in this petition.

If the jury finds from all the evidence that the description of the land in the marshal's deed, aided by the two James Stewart patents, applies equally well to both of said Stewart surveys, or if you believe that the land is not so described therein that a man of common understanding could from the description in said marshal's deed determine which one of the two Stewart surveys was conveyed by said deed, or if you believe that the land in said marshal's deed is not so described that a man of common understanding could determine what land was conveyed thereby, or from the description of the

land in said marshal's deed point it out and identify it with
60 the land described in plaintiff's petition, they will find for defendants.

Charge No. 9 (nine.)

The jury are not to determine what the intention of the marshal was as to what tract of land he intended to sell; but if you are satisfied by a preponderance of evidence that the marshal intended to sell that James Stewart survey described in plaintiff's petition, but did, in fact, sell another parcel of land patented to the heirs of James Stewart for 960 acres, they will find for the defendants.

If the jury believe that the description of the land in the marshal's deed is more applicable to the James Stewart on Bull Hide than to the James Stewart described in plaintiff's petition, they will find for the defendants.

If it appears from the preponderance of evidence that the marshal did, in fact, sell the land in controversy and the plaintiff was the purchaser, but in deed of conveyance by him to the plaintiff so described the land that it could not with reasonable certainty be found and identified by a man of common understanding, the deed is void, and they will find for the defendants.

If the jury are satisfied from the evidence that the marshal's deed conveyed to the plaintiff one of the James Stewart surveys in McLennan county, the burden is upon plaintiff to show which one was conveyed, and unless they are enabled by the evidence to determine satisfactorily to themselves which one was so conveyed they will find for defendants.

The jury are instructed that altho' the defendants might have known of plaintiff's claim of title to the land in controversy, yet, if they believe they had a better title, which you are to determine from the evidence, altho' the plaintiff's title might turn out
61 to be the superior title, still as a question of fact you are to determine the good faith of the defendants; and if you so find defendants are entitled to the value of their improvements not exceeding the difference between the value of the land with the improvements & the value of land without the improvements the jury are instructed that the burden is on plaintiff to show a better title to the land in controversy than that shown by the defendants in order to his recovery; that the marshal's deed under which plaintiff's claim is a necessary link to his chain of title and that they are to look to that deed, and if they find from the description of the property alone or from its description aided by the maps, the patents, and other deeds in evidence and the testimony of witnesses that the description of the property conveyed by the marshal's deed is no more applicable to the land described in plaintiff's petition than to another tract of land in the same county and neighborhood they will find for the defendants. The jury are further instructed that sheriff's deeds are deeds made under forced sale of the property of citizens; that no intendment of the officer making the same can be presumed by them, and that the burden is upon the plaintiff to show by the evidence that the land described in the

petition is the land conveyed by the marshal's deed, and if it does not so satisfy the minds of the jury that the land in controversey is identified as the land described in the marshal's deed they will find for the defendants.

All of which requested charges were refused by the court; to which ruling defendants then and there excepted and here and now tender their bill of exceptions and pray the same be signed & filed and made part of the record in the cause, which is accordingly done in open court this 9th day of January, A. D. 1890.

A. P. McCORMICK,
U. S. Dist. Judge.

62 *Bill of Exceptions No. 8.*

Be it remembered that on the trial of this cause, after the evidence had been closed and argument of counsel, the court, on the question of title, charged the jury as follows, to wit, being all of this charge on the title:

"This is a suit to recover land as described in plaintiff's petition. He has introduced in evidence a chain of title from the Government to him in support of his claim. If the description in the marshal's deed to Hart and his partners named in the deed described the land that the plaintiff has sued for the plaintiff is entitled to recover. The only question as to their title in issue before you is whether the land they sue for is the land described in the marshal's deed. This description, you will bear in mind, is 'a certain tract or parcel of land containing, by estimation, 898 acres lying in Milam district, in McLennan county, on Cow Bayou and Bull Hide streams, patented to the heirs of James Stewart for 960 acres.'

The proof developes that there are two tracts of land patented to the heirs of James Stewart, each for 960 acres. The position of defendants is that this description applies as well, if not better, to the eastern James Stewart No. 380, but plaintiff contend- that it does not. Whether the marshal's deed is a deed to No. 379 is the question for you to determine; whether it is described with sufficient distinctness, taking the description in the patent and deed; it conveys the the whole grant, if it coveys any. The amount of land, the number of acres, being different in the deed from that in the patent, you are only to consider as a circumstance in connection with all the other proof in your inquiry as to whether the description in the marshal's deed does describe either one of the two James Stewart sur-

63 veys. The burden is on the plaintiff. You must be satisfied from the proof given that No. 379, the western Stewart grant, is the land described in the marshal's deed before you can find for the plaintiff. If the proof satisfies you that the land the marshal describes in his deed as lying on Bull Hide and Cow Bayou streams is the western Stewart No. 379, then the plaintiff is entitled to recover; if otherwise, the plaintiff cannot recover and your verdict must be for the defendants, etc."

To which charge defendants excepted:

1st. Because the court did not submit to the jury as an issue of fact whether or not under all the evidence the deed from the Stewart heirs to De Cordova in 1854 was a forgery, but charged the jury that the same was sufficient to support the title

2nd. Because the court in its charge to the jury on the description contained in the marshal's deed did not limit the jury to description in said deed and papers referred to in said description, but left them to take into consideration all the deeds in evidence in aid of said defective descriptions.

3rd. The court misled the jury by saying ("if the proof satisfies you that the grant the marshal describes in his deed as lying on Bull Hide, then the plaintiff," etc.), because the deed does not so describe the land, and by saying to the jury ("the position of the defendant is that this description (in the deed) applies as well, if not better, to the western Stewart or 379"), because the defendant's position was that such description was vague and applied better to the eastern Stewart, 380; which exceptions were overruled by the court; — the defendant in open court — and still does except, and herewith tenders his bill of exceptions and prays that the same be allowed, approved, and signed. Allowed in open court January 9th, 1890.

64 A. P. McCORMICK,
U. S. Dist. Judge.

Bill of Exceptions No. 9.

Be it remembered that on the trial of this cause and while the jury were in retirement, considering of their verdict, the hour for adjournment of the court to the succeeding day arrived and the court adjourned, the marshal being directed, as the practice of the court is, to permit the jury to disperse on their agreeing to a verdict and leaving it in a sealed envelope in the custody of the proper officer and under instructions to return at the opening of the court next day, that the court might receive from them their verdict, which was done, and on the opening of the court the jury were called, and, all being present, the court directed the clerk to open and read the verdict, which being read, the court declined to accept it because it did not show separately the value of the land without the improvements and the value of the improvements made by the respective defendants and the value, if any, of the rent of the land without improvements, as required by statute and the instructions given the jury as to the form of their verdict in case they found the land for the plaintiff, and the defendants were possessors in good faith for more than one year before the institution of this suit and had made valuable improvements. That part of the charge relating to the form of the verdict was repeated to the jury and they directed to retire and reform their verdict. Immediately on the jury retiring, the marshal was directed to inform the jury that the judge would reduce to writing that part of the charge and send it
65 to them; and thereupon the judge in open court reduced to writing said part of his charge as follows, to wit: In case

you find for the plaintiffs the land in controversy and find for the defendants that they or any of them were possessors thereof or any part thereof in good faith, as defined in other portions of the charge, and have made valuable improvements thereon, you must show by your verdict:

First. The value at this time of such improvements as were so made before the filing of this suit, 1st Sept., 1888, not to exceed the amount to which the value of the premises is actually increased thereby.

Second. The value, if any, of the use and occupation of the premises while so occupied for a period not longer than two years before the filing of this suit.

Third. You must show the value of the land without the improvements made as aforesaid. The form, therefore, of your verdict, if you find for the plaintiff and the land for the defendants or any of them the value of their improvements, will be, We, the jury in the case (giving its style) find for the plaintiff the land in controversy, and we further find that the defendant (naming him) has made valuable improvements on (giving the number of acres he has improved on) of the value of $— (giving the amount in value of his improvements), and defendant (naming him) has improved on (giving acres as last above) of the value of $—, &c.

2. We find the value of the rents as follows: $—.

3. We find the value of the lands held by the defendants respectively and without the improvements thereon to be as follows (giving the values respectively.)

A. P. McCORMICK, *Judge.*

66 And read the same in open court, counsel for both parties being present, and sent said writing by the marshal to the jury; to which action of the court the defendant-, by their counsel, objected, stating as his ground of objection, "1st, the court had no authority in law to give the jury additional instructions, except at the request of the jury;" "2nd, the court should instruct the jury in open court and not by written direction sent to the jury-room;" which objection *were* overruled by the court; to which the defendants did then and there, in open court, except, and now tender their bill of exceptions, and, the counsel not being able to agree, the foregoing bill is prepared under direction of the judge and is allowed this 9th day of January, 1890, in open court.

A. P. McCORMICK,
U. S. Dist. Judge.

Bill of Exceptions No. 10.

Be it further remembered that after the verdict in this case had been returned into court the defendants filed and presented to the court the following motion & prayed the entry of judgement, notwithstanding said verdict:

United States Circuit Court for the Northern District of Texas, at Waco.

E. J. HART
vs.
T. B. COX *et al.* } No. 373.

Now come the defendants and move the court to arrest the judgement in this cause & not enter the same upon the verdict filed Nov. 30, 1889, and move the court to grant a judgment herein for the defendants for the following reasons, to wit:

1st. The evidence having been closed & argument begun,
67 the defendants in their argument moved the court to strike out from the evidence the deed from Wm. H., Jno. T., and Catherine Stewart to Jacob De Cordova, of date April 12, 1854, for the reasons that the same was not competent to be proven under the statute, there being an affidavit of forgery on file from the defendants.

2nd. The same was then before the court as an ancient instrument, and there was no act of possession, payment of taxes, or other act tending to establish its genuineness proven or in evidence before the jury.

3rd. Nor was there any proof of any character of evidence before the jury that the same had been executed by said purported grantors.

2nd. That after the argument by defendants' counsel had been closed & plaintiff's counsel in his closing argument had discussed the question of law before the court the court held as a matter of law that said deed was not supported by sufficient proof to admit it before the jury as sufficient title, and gave the plaintiff the alternate choice of taking a nonsuit or of an instruction of the court to the jury to find for the defendants; that the plaintiff chose the latter, & *and* the court charged the jury to find for the defendants, instructing the foreman to sign the verdict, which was prepared by the clerk, presented to the foreman, signed by him, and returned to the clerk of the court, whereby the same became the verdict of the jury in said case, and the court had no further power to charge the *the* jury or reject the verdict for defendants, the said verdict having been rendered in their favor, and the judgment is prayed to be entered thereon; for all of which evidence of the records see bill of exceptions to be marked No. 1 when approved by the court; and further moved the court to exclude the marshal's deed for the reasons:

3rd. SEC. 1. Marshal Young's deed to De Cordova, of date
68 1858, shows upon its face that no sufficient description is given of any land so that the land may be identified.

2ND SEC. It shows upon its face that it describes, if any, the land lying upon two streams, whereas the land described in the plaintiff's description lies upon the waters of the streams & not upon the streams themselves, thereby showing a variance, the expression "waters" meaning the tributaries draining into the streams and not the streams themselves, the tributaries covering a large scope of

country, said expression having dif-erent and well-defined meanings.

3RD SEC. It is confessed by the plaintiff that the deed of itself does not describe any land, & that the patent, if any, to the heirs of James Stewart must be consulted for description; but the deed itself does not by its terms refer to any particular patent professing to make such patent a part of the deed for description, & unless this is done no patent can be consulted.

The expression "patented" is not equivalent to "see the patent to the heirs of James Stewart for description."

4TH SEC. If the expression "patented," etc., is equivalent to "see the patents," etc., yet no specific patent by number, date, etc., is described, and it would require a search through the land office to find a patent to describe the land, rather than a search on the grounds to find land to satisfy the field-notes of a certain patent, and unless identified by the deed the patent cannot be looked to in a marshal's deed for description.

5TH SEC. There are two patents to the heirs of James Stewart of which judicial knowledge must be taken by the court by reason of these patents being public grants, and also by reason of there
69 being on file a report of Surveyor Stephen Turner, appointed by the court to make a survey in this case, showing by said report that there are two patents to the heirs of James Stewart, for 960 acres each, in McLennan county. There is no expression in the marshal's deed to show which of these patents is meant or to identify any particular patent.

SEC. 6. Should the court not take judicial knowledge of these two patents, yet it is not attempted in said deed to describe any patent.

7TH SEC. If there is any vagueness in the words used (in said deed) (or any terms of art), or any deed, made by marshal or sheriff or officer acting without the consent of the grantors for whom he makes the conveyance, such terms of art may be explained or the vagueness of the face of the paper interpreted by those who may be able to give such interpretation. When so interpreted the deed must describe the land. Then the terms used in this deed need no interpretation, & fail to identify, not only any land, but any patent, and it is clear from the face of the paper itself that extensive evidence must be introduced, as well to identify, intended to be referred to in the deed if any, as to identify the land itself. This conclusion must be reached from an inspection of the face of the marshal's deed before any evidence is introduced.

SEC. 8. The deed with reference to the expression "patented *with* the heirs of James Stewart for 960 acres" uses no other words attempting to describe the patent. It is true the deed refers to land lying on Cow Bayou and Bull Hide streams, but it was not intended that from all the patents in the land office a certain patent should be selected containing these words. If the patent was intended to be refer-ed to at all it should be so described as to be selected
70 by the purchaser irrespective of the location of the land, and when the patent was found it might be taken and from its feild-notes a certain tract of land be located on Cow Bayou & Bull

Hide streams. By reason of the use of the expression "on Cow Bayou and Bull Hide streams," the patent itself is not better identified than if these words had not been used. The deed makes reference to the patent, if any, only by the use of the words "patented to the heirs of James Stewart for 960 acres."

SEC. 9TH. Should the court construe the words "lying on Cow Bayou and Bull Hide streams" as descriptive of the patent, the same objection holds to its accuracy as shown in sec. No. 2, with reference to its attempts to describe the land, and a variance between it and the petition is shown, as the word used in the petition is "waters," & the land lies upon the waters of the stream according to the description of the latter, and maybe (as the maps of the country really show) the land in question is a long distance from either stream.

SCAROBOROUGH & ROGERS.
T. B. COX, *For Def'ts.*
EUGENE WILLIAMS, *For Def'ts.*

Filed Dec. 2nd, 1889.

J. H. FINKS, *Clerk.*

Which being heard by the court was overruled; to which ruling the def'ts in open court did then & there except; allowed in open court Jan'y 9th, 1890.

A. P. McCORMICK.
U. S. District Judge.

71 *Bill of Exceptions No.* 11.

Be it remembered that after verdict and judgment rendered in this cause Nov. 30, 1889, defendants filed and presented their motion for new trial, as follows:

In U. S. Circuit Court, Northern District of Texas, at Waco.

E. J. HART
vs.
T. B. COX *et al.* } No. 373.

Now come defendants and move the court to set aside the verdict returned into this court on the 30th day of November, and if judgement has been entered thereon to set aside such judgment and to grant a new trial unless judgment is or will be rendered for the defendants, for the following reasons, to wit:

1. For the reasons fully set out in defendants' motion in arrest of judgement, which is referred — and made part hereof; see also bill of exceptions No. —.

2. The non-production of the original of the deed from Wm. H., Jno. T., and Catherine Stewart having been waived under the statute, a copy of the same was allowed in evidence for what it was worth as an ancient instrument without accounting for original at common law, as appears by bill of exceptions No. —.

3. The court erred in holding the plaintiff's said deed to be a link in defendants' De Cordova title, claimed by the defendants to be a

title through De Cordova by common source alone and so stated to be at the time the title deeds up to De Cordova were introduced by the defendants.

4. The court erred in holding defendants estopped to attack said deed by affidavit of forgery. For all the evidence containing said deed see bill of exceptions No. —.

5. The court erred in failing to submit to the jury a charge
72 upon said deed as requested by defendants in their requested instruction marked charge No. 1, and also erred in failing to instruct the jury to find for the defendants unless, by some evidence in addition to age and custody of said deed, some act had been done freeing the same from all just grounds of suspicion. See bill of exceptions No. —.

6. The court erred in withdrawing from the jury the issue of the forgery of said deed. See bill of exceptions No. —.

7. The jury erred in finding the evidence sufficient to support a verdict for the plaintiff in that the evidence more strongly identified survey No. 380 than survey No. 379 as the land referred to in the marshal's deed to E. J. Hart *et al.*; (2) said evidence at the most left the issue equally well proven as to both surveys 380 and 379; (3) the only description tending to fix No. 379 as the one referred to by the marshal's deed was the fact that this survey was described in the forged deed from Wm. H., Jno. T., and Catherine Stewart to J. De Cordova; (4) because the description in the deed called for land on Bull Hide and Cow Bayou streams, whilst the evidence showed survey No. 379 was not on either; (5) because if survey No. 379 was on the waters of those streams, as called for in its patent, this would not locate on the streams, as described in the marshal's deed.

8. The court erred in failing to give charges 4, 5, 6, 7, 8, and in failing to give each of them as requested by defendants. See bill of exceptions No. —.

9. The court erred in failing to give each of the instructions marked charges 9. See bill of exceptions No. —.

73 10. The court erred in admitting the copy of the deed from Wm. H., Jno. T., and Catherine Stewart to J. De Cordova because the certificate of the purported commissioner was not sufficient to identify the purported grantors, but referred to them "as described as and professing to be" the grantors, and because it did not state that the purported grantors executed the instrument.

Which said motion for new trial was by the court overruled; to which ruling defendants then and there excepted and here and now tender this their bill of exceptions and pray the same be signed & filed — a part of the records of this cause.

Allowed in open court Jan'y 9th, 1890.

A. P. McCORMICK, *Dist. Judge.*

Bill of Exceptions No. 12.

Be it remembered that after the trial of this cause and after the recording of the decree herein defendants filed the following motion:

In the U. S. Circuit Court for Northern District of Texas, at Waco.

E. J. HART
vs.
T. B. COX *et al.* } No. 373.

Come now the defendants T. B. Cox and S. E. Echols and move the court to reform and amend the judgement herein rendered on, to wit, Nov. 30th, 1889. This motion is made subject to defendants' motion for new trial and motion in arrest of judgement herein filed.

And if said motion be by the court overruled the defendants Cox and Echols pray that said judgement be so reformed and amended as to allow a direct execution for the $10,000 improvements, made by them in good faith, to issue against plaintiff, E. J. Hart, as in judgments generally; and should this not be granted them
74 to issue, in the event said plaintiff should fail to pay to these defendants the said amounts awarded them by the court for improvements made in good faith—that is to say, should plaintiff fail to pay to said defendants said amounts within one year from date of judgement & defendants should fail to pay to plaintiff the amount fixed by the judgement as the value of the land within six months after the expiration of the said one year and should plaintiff then become entitled to his writ of possession—said defendants Cox and Echols pray that in that event they have execution on their judgement against plaintiff, E. J. Hart, for amount of the same, to wit, defendant T. B. Cox for the sum of $6,250, with interest, and defendant S. E Echols for the sum of $3,750, with interest, and that said judgement be declared to be a lein upon the land upon which their respective improvements are situated in the hands of plaintiff.

And in addition to the reasons in said motion given defendants made the following further exceptions to said decree:

(1.) That it is not supported by the verdict, in that the verdict describes no land upon which any improvements were situated.

(2.) It did not award defendants a judgment for the amount of their improvement in good faith, but simply contained a recital naming the amount as found by the jury for defendants T. B. Cox and S. E. Echols respectively for improvements in good faith, and they prayed that such judgment be so amended, which prayer and motion were by the court overruled; to which ruling defendants then and there excepted and here and now tender this their bill of exception and pray the same be signed and filed & made a part of the record of the cause.

Inasmuch as the foregoing matters of law and the said several rulings, instructions, and decisions of the court do not appear upon the record of the trial of the above cause, on the prayer of
75 the defendants S. E. Echols, Thomas Tinsley, and T. B. Cox, the said judge signs this as and for the bill of exceptions in said cause as of the 30th day of November, 1889. Done in term, this the — day of ——, 18—.

Allowed in open court Jan'y 9th, 1890.

A. P. McCORMICK, *Dist. Judge.*

Endorsed: No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Bill of exception. Filed Jan. 9th, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

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E. J. HART
vs.
T. B. COX *et al.*

Now comes plaintiff in the above cause and objects to the bills of exceptions of defendants made by defendants' counsel and submitted to plaintiff's counsel on the afternoon of the 12th day of December, 1889, and being the bill of exceptions of defendants numbered one, two, three, four, five, six, seven, eight, and nine, respectively—

Because the rulings and decisions of the court on the trial of said cause and excepted to — the defendants, as shown by said bill of exceptions, were made on the 27th, 28th, 29th, and 30th days of November, 1889, and said bill of exceptions, numbered 1, 2, 3, 4, 5, 6, 7, 8, & 9 as aforesaid, were not submitted by defendants to opposing counsel of plaintiff until the 12th day of December, 1889, in the afternoon, being more than ten days after the ruling or decision of the court excepted to by defendants in said bill of exceptions, and no further time was allowed by the court within which to make out and submit bill of exceptions; and because under the rules of this court, as prescribed on page 8, subdivision B, of the rules of the circuit court for the northern district of Texas, said bill of exceptions were submitted too late and should not be allowed.

JONES, KENDALL & SLEEPER,
Attorneys for Plaintiff.

Endorsed: No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Plaintiff's objections to defendants' bill of exceptions. Filed Dec. 14, 1889. J. H. Finks, clerk, by C. A. Richardson, deputy.

77 United States Circuit Court for the Northern District of Texas, at Waco.

E. J. HART
vs.
T. B. COX *et al.* } No. 373.

Now come the defendant- and moves the court to arrest judgment in this cause and not enter the same upon the verdict filed November 30, 1889, and move the court to grant a judgment herein for the defendants for the following reasons, to wit:

1st. The evidence having been closed and the argument begun, defendants in their argument moved the court to strike out from the evidence the deed from William H., John T., and Catherine Stewart to Jacob De Cordova, of date April 12th, 1854, for the reasons (1st) that the same was not competent to be proven under the statute, there being an affidavit of forgery on file from the defendants; (2nd) the same was then before the court as an ancient instrument, and there was no act of possession, payment of taxes,

or other act tending to establish its genuineness proven or in evidence before the jury; (3rd) nor was there any proof by any character of evidence before the jury that the same had been executed by said purported grantors.

2nd. That after the argument by defendants' counsel had been closed and plaintiff's counsel in his closing argument had discussed the question of law before the court, the court held, as a matter of law, that said deed was not supported by sufficient proof to admit it before the jury as evidence of title, and gave the plaintiff the alternate choice of taking a nonsuit or of an instruction of the court to the jury to find for the defendants; that the plaintiff chose the latter, and the court charged the jury to find for the defendants, instructing the foreman to sign the verdict, which was prepared by the clerk, presented to the foreman, and signed by him and returned to the clerk of the court, whereby the same became the verdict of the jury in said cause, and the court had no further power to
78 charge the jury or to object to its verdict, and judgment is prayed to be entered thereon for the defendants, the said verdict having been rendered in their favor; for all of which evidence of the record, see bill of exceptions, to be marked No. 1 when offered by the court.

Marshall's Deed.

3rd. SEC. 1ST. Marshal Young's deed to De Cordova, of date 1858, shows upon its face that no sufficient description is given of any land so that the land may be identified.

2ND SEC. It shows upon its face that it describes, if any, land lying upon two streams, whereas the land described in plaintiff's petition lies upon "the waters of the streams" and not upon the streams themselves, thereby showing a variance, the expression "waters" meaning the tributaries draining into the streams and not the streams themselves, the tributaries covering a large scope of country, said expressions having different and well-defined meanings.

3RD SEC. It is confessed by the plaintiff that the deed of itself does not describe any land; that the patents, if any, to the heirs of James Stewart must be consulted for description; but the deed itself does not by its terms refer to any particular patent, professing to make such a patent a part of the deed for description, and unless this is done no patent can be consulted. The expression "patented" is not equivalent to "see the patent to the heirs of James Stewart for description."

4TH SEC. If the expression "patented and etc." is equivalent to "see patent, &c.," yet no specific patent by number, date, &c., is described, and it would require a search through the land office to find a patent to describe the land, rather than a search on the ground to find land to satisfy the field-notes of a certain patent. Un-
79 less identified by the deed the patent cannot be looked to in a marshal's deed for description.

5TH SEC. There are two patents to the heirs of James Stewart of

which judicial knowledge must be taken by the court by reason of these patents being public grants, and also by reason of there being on file a report of Surveyor Stephen Turner, appointed by the court to make a survey in this case, showing by said report that there are two patents to the heirs of James Stewart, for 960 acres each, in McLennan county. There is no expression in the marshal's deed to show which of the patents is meant or to identify any particular patent.

SEC. 6TH. Should the court not take judicial knowledge of these two patents, yet it is not attempted in said deed to describe any patent.

SEC. 7TH. If there is any vagueness in the words used or any terms of art used in said deed or any deed made by marshal or sheriff or officer acting without the consent of the grantors for whom he makes the conveyance, such terms of art may be explained or the vagueness on the face of the paper interpreted by those who may be able to give such interpretation. When so interpreted the deed must describe the land. Here the terms used in this deed needs no interpretation and fail to identify, not only any land but any patent, and it is clear from the face of the paper itself that extrensic evidence must be introduced as well to identify the patent intended to be referred to in the deed, if any, as well as to identify the land itself. This conclusion must be reached from an inspection of the face of the marshal's deed before any evidence is introduced.

SEC. 8TH. The deed with reference to the expression "patented to the heirs of James Stewart for 960 acres" uses no other words attempting to describe the patent. It is true that the deed refers to land lying on Cow Bayou and Bull Hide streams, but it was not intended from all the patents in the land office a certain patent should be selected containing these words. If the patent was intended to be referred to at all it should be described to be selected by the purchaser irrespective of the location of the land, and when the patent was found it might be taken — from its field-notes a certain tract of land be located on Cow Bayou and Bull Hide streams. By reason of the use of the expression on Cow Bayou and Bull Hide streams the patent itself is not better identified than if these words had not been used.

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The deed makes reference to a patent, if any, only by the use of the words "patented to the heirs of James Stewart for 960 acres."

SEC. 9. Should the court construe the words "lying on Cow Bayou and Bull Hide streams" as descriptive of the patent the same objection holds to its accuracy as shown in section No. 2, with reference to its attempt to describe the land, and a variance between it and the petition is shown, as the word used in the petition — "waters," and the land lies upon the waters of the streams according to the description of the latter, and maybe (as the map of the country really shows) the land in question *to be* a long distance from either stream.

SCARBOROUGH & ROGERS,
T. B. COX, *For Def'ts.*
EUGENE WILLIAMS, *For Def'ts.*

Endorsed: No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Motion in arrest of judgement. Filed Dec. 20, 1889. J. H. Finks, clerk.

81 In Circuit Court United States for the Northern District of Texas, at Waco.

E. J. HART *vs.* T. B. COX *et al.* } No. 373.

To the honorable judge of said court:

Now comes the defendant- T. B. Cox, Thomas Tinsley, and S. E. Echols and represent that on the trial of the above cause at this the November term of said court a verdict was, on November 30, 1889, rendered in favor of the plaintiff, E. J. Hart, against said above-named defendants and their codefendants, J. P. Williams and S. L. & D. E. Swim, whereon judgement was rendered against all the defendants aforesaid, as shown by the records of said court, judicially known to your honor, from which judgement said defendants T. B. Cox, Thomas Tinsley, and S. E. Echols desire to prosecute their writ of error to the Supreme Court of the United States, and in which writ therein said codefendants refuse to join; wherefore said defendants Cox, Tinsley, and Echols pray that a certiorari such as is required by law and by the rules of the said Supreme Court be granted to them, and that their said codefendants, J. P. Williams, S. L. & D. E. Swim, be summoned to appear before your honor's court, as required by law, to show cause, if any they may have, why such severance should not be granted and why writ of error should not issue in behalf of said Cox, Tinsley, and Echols.

SCARBOROUGH & ROGERS,
T. B. COX, *For Echols.*
EUGENE WILLIAMS, *For Tinsley.*

82 Endorsed: E. J. Hart *vs.* T. B. Cox *et al.* Application for severance. Service accepted, summons waived, and it is agreed order of severance may be granted. Pearre & Boynton, att'ys for S. L. & D. E. Swim. J. P. Williams, for himself. Filed Jan. 8th, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

83 E. J. HART *vs.* T. B. COX *et al.* } No. 373.

On this the 9th day of January, 1890, was heard the application of defendants T. B. Cox, Thomas Tinsley, and S. E. Echols, praying that a severance be granted as to them and that they be given leave to prosecute a writ of error herein separate and apart from their co-defendants, J. P. Williams and S. L. Swim and D. E. Swim, and it appearing that said codefendants have been served with notice of the said application and have accepted such service and have agreed that such leave be granted, it is ordered and adjudged that said severance be, and the same is here now, had, and that the said T. B. Cox, Thomas Tinsley, and S. E. Echols be, and they are here now, granted

leave to prosecute their writ of error separately and apart from their codefendants; they have failed to answer said application and have failed and refused to join in petition for writ of error herein.

Endorsed: No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Copy of judgment and order of severance. Filed Jan. 8, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

84 UNITED STATES OF AMERICA, *Northern District of Texas.*

In Circuit Court, at Waco.

E. J. HART *vs.* T. B. COX *et al.* } No. 373.

To the honorable judge of the Supreme Court of the United States

And now come T. B. Cox, Thomas Tinsley, and S. E. Echols, defendents in said circuit court in said cause (and having severed, by order of the said circuit court, from their codefendants, J. P. Williams, S. L. Swim, and D. E. Swim), by their attorneys, hereto subscribing themselves, and complain that in the records and proceedings and also in the rendition of the judgment in said cause between E. J. Hart, plaintiff, and T. B. Cox, Thomas Tinsley, S. E. Echols, S. L. Swim and D. E. Swim, and J. P. Williams, defendants, tried in said circuit court for the northern district of Texas, at Waco, at the December term thereof, 1889, and in which judgment was rendered against said defendants for the land in controversy (adjudging improvements and costs, — therein more fully appears) on the — day of December, 1889, manifest error hath intervened, to the great damage of the said T. B. Cox, Thomas Tinsley, and S. E. Echols; wherefore the said T. B. Cox, Thomas Tinsley, and S. E. Echols pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

SCARBOROUGH & ROGERS,
T. B. COX, *For Def'ts.*
EUGENE WILLIAMS,
For Thomas Tinsley.

Allowed.
A. P. McCORMICK, *Judge.*

[Endorsed:] No. 373. E. J. Hart *vs.* T. B. Cox *et al.* Petition for writ of error. Filed Jan. 9th, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

85 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you

or some of you, between E. J. Hart, of the city of New Orleans, State of Louisiana, plaintiff, and T. B. Cox, Thomas Tinsley, S. E. Echols, D. E. Swimm, S. L. Swimm, and J. P. Williams, defendants, in said circuit court, in cause No. 373 on the docket of said circuit court, a manifest error hath happened, to the great damage of the said defendants T. B. Cox, Thomas Tinsley, and S. E. Echols, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 9th day of January, in the year of our Lord one thousand eight hundred and ninety (1890).

J. H. FINKS,
Clerk of the 5th — Court of the United States,
Northern District of Texas,
By C. A. RICHARDSON, *Deputy.*

Allowed by—
A. P. McCORMICK,
U. S. Dist. Judge.

[Endorsed:] Honnicutt *v.* Peyton, 102 U. S., 333; 26, 116. Coe *v.* Morgan, 13 Fed. R., 854; U. S. *v.* Fraser, 12 Fed. R., 854; 110 U. S., 52. 373. 23. Filed Jan'y 9th, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy. Honeycut *vs.* Peyton, about this return of court.

Service accepted, return time, copy, and notice of writ waived, this — day of December, 1889.

——, ——,
Att'ys for E. J. Hart, Defendant in Error.

86 Know all men by these presents that we, T. B. Cox, Thomas Tinsley, and S. E. Echols, as principals, and J. K. Rose and R. G. Pidcoke, as sureties, are held and firmly bound unto E. J. Hart in the full and just sum of five hundred dollars, to be paid to E. J. Hart, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of January, in the year of our Lord one thousand eight hundred and ninety (1890).

Whereas lately, at a stated term of the circuit court of the United States for the northern district of Texas, at Waco, in a suit pending

in said court between E. J. Hart, plaintiff, and T. B. Cox, Thomas Tinsley, S. E. Echols, D. E. Swim, S. L. Swim, and J. P. Williams, defendants, numbered 373 on the docket of said circuit court, a judgment was rendered against the said defendants for the land in controversy, adjudging improvement and costs, as in said judgment more fully appears, and the said defendants T. B. Cox, Thomas Tinsley, and S. E. Echols having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgement in the aforesaid suit, and a citation, directed to the said E. J. Hart, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said defendants T. B. Cox, Thomas Tinsley, and S. E. Echols shall prosecute the said writ of error to effect and answer all costs if they fail to make their plea good; then the above obligation to be void; else to remain in full force and virtue.

87 THOMAS TINSLEY. [SEAL.]
S. E. ECHOLS,
By T. B. COX. [SEAL.]
T. B. COX. [SEAL.]
J. K. ROSE.
R. G. PIDCOKE.

Sealed and delivered in presence of—

——— ———.

Approved by—
A. P. McCORMICK,
U. S. Dist. Judge.

Endorsed: Filed Jan. 9, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

88 The United States of America to E. J. Hart, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the 5th circuit court of the United States for the northern district of Texas, at Waco, wherein T. B. Cox, Thomas Tinsley, and S. E. Echols (having, by order of court, severed from their codefendants, J. P. Williams, S. L. Swim, and D. E. Swim, in the said circuit court) are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. P. McCormick, judge of the district court of the United States for the northern district of Texas, holding said circuit court at Waco, this 9th day of January, in the year our Lord one thousand eight hundred and ninety (1890).

A. P. McCORMICK,
U. S. Dist. Judge.

Service of this citation accepted, time, copy, and issuance of citation waived, this — day of December, 1889.

JONES, KENDALL & SLEEPER,
Att'ys for E. J. Hart, Defendant in Error.

Endorsed: Filed Jan. 9, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

89 UNITED STATES OF AMERICA, } ss:
Northern District of Texas, }

I, J. H. Finks, clerk of the circuit court of the United States, fifth circuit, in and for the northern district of Texas, do hereby certify that the foregoing eighty-nine pages of writing conta n a full, true, and correct transcript of the record in case No. 373 on the docket of said court at Waco, entitled E. J. Hart *vs.* T. B. Cox *et al.*, as the same appears on file and of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said U. S. circuit court, at office, in Waco, Texas, this the 10th day of September, A. D. 1890.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.]

J. H. FINKS, *Clerk*,
By C. A. RICHARDSON, *Deputy.*

Endorsed on cover: Case No. 14,218. N. Texas C. C. U. S. No. 828. T. B. Cox, Thomas Tinsley, and S. E. Echols, plaintiffs in error, *vs.* E. J. Hart. Filed October 7, 1890.

FILED.
DEC 7 1891

IN THE

SUPREME COURT OF THE UNITED STATES,

—— ON WRIT OF ERROR FROM THE ——

CIRCUIT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF TEXAS,
AT WACO.

NO. 14,218. OCTOBER TERM, 1891.

T. B. COX, THOS. TINSLEY AND S. E. ECHOLS,
Plaintiffs in Error.

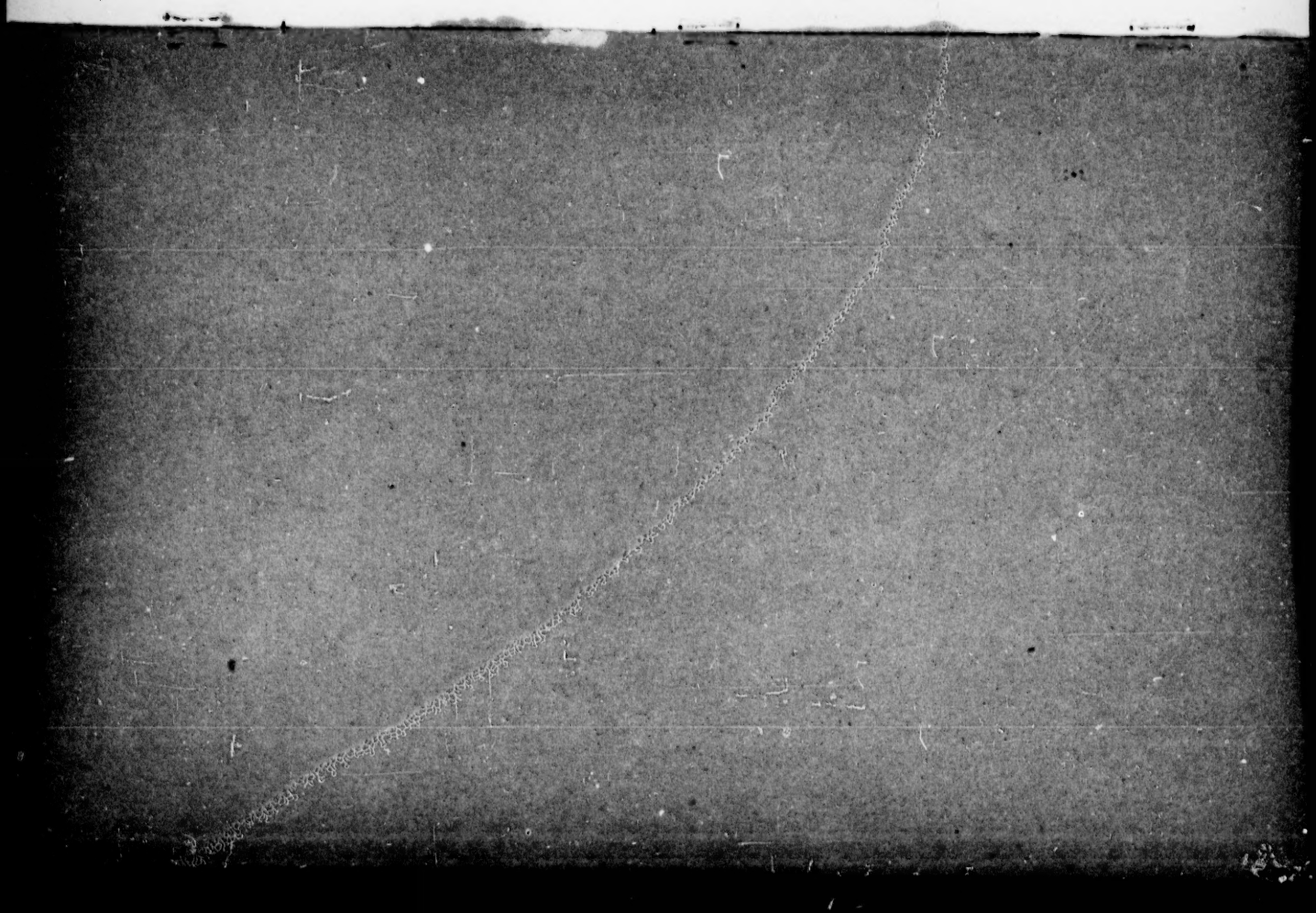
vs.

E. J. HART, *Defendant in Error.*

BRIEF OF PLAINTIFFS IN ERROR.

J. B. SCARBOROUGH, AND
WILLIAMS & EVANS,
Attorneys, and of Counsel for T. B. COX, THOMAS TINSLEY *and* S. E. ECHOLS.

JUDAH & WILLIAMS PRINTING HOUSE, WACO.



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NO. 14,218. OCTOBER TERM, 1891.

T. B. COX, THOS. TINSLEY AND S. E. ECHOLS,
Plaintiffs in Error.

vs.

E. J. HART, *Defendant in Error.*

BRIEF OF PLAINTIFFS IN ERROR.

Statement of the Case.

This suit was filed on Sept. 23rd, 1888, by E. J. Hart, a citizen of Louisiana, against defendants Cox, Tinsley, Echols, J. P. Williams, D. E. Swim and S. L. Swim, citizens of Texas, in the ordinary form of an action of trespass to try title to the land described in Plaintiffs petition, (record p. 1) amendment thereto being filed Nov. 23rd, 1888 (record p. 3).

Defendants answered by demurrer, general denial, pleas of not guilty and limitation, and suggested improvements in good faith, and in event Plaintiffs should gain the land Defendants asked judgment for the value of the improvements so claimed to-wit: Defendant Cox for the

sum of $6300, and Defendant Echols for the sum of $3700 (record p. 9 and 10).

The case was called for trial Nov. 27th, 1889, and the Court having overruled defendant's motion for continuance, which is assigned as error, proceeded with the hearing, which resulted in judgment for the plaintiff for the land and for defendants for $10,000, the value of the improvements claimed (record p. 13).

Two verdicts were had during the trial; the first, for the defendants on which the court refused to enter judgment, (record p. 31) the second for plaintiff (record p. 12) on which the judgment was entered.

Defendants moved for entry of judgment on the first verdict which was refused, and thereafter upon entry of judgment on the second verdict moved for award of execution on judgment for $10,000 improvements in good faith which was also refused.

Motion for new trial was overruled and the defendants Cox, Echols and Tinsley, having severed from their codefendants, bring their writ of error to this Court (record p. 46), assigning the above rulings as error. Plaintiff Hart claimed title through the following chain (record p. 28): 1st. Patent No. 379, vol. v., from the State of Texas to the heirs of James Stewart, dated July 2nd, 1849; 2nd. Certified copy of a deed purporting to be the act of Wm. H., John T. and Catherine Stewart, to J. De Cordova, dated April 12th, 1854, claimed by defendants to have been forged. 3rd. Evidence that the above grantors were the heirs of James Stewart deceased; and 4th. Original pretended deed of J. De Cordova by Wm. C. Young, U. S. Marshall to E. J. Hart, dated Sept. 7th 1858, claimed by defendant to be void for uncertainty in the description of the land sought to be conveyed.

5th. Plaintiffs also claimed that the defendants held title under De Cordova and that Plaintiff Hart was not required under any state of circumstances to prove title beyond a common source, and that defendants could not show superior title in themselves, which view was held by the Court and is assigned as error (record p. 29). In support of his claim, to prove common source of title, plaintiff introduced copy of a deed from De Cordova by ad-

ministrator to defendant Cox, dated May 29th, 1884, and Cox's deed to Tinsley and Echols (record p. 29).

Defendants Cox, Tinsley and Echols claimed through Patent No. 379, vol. v., to the heirs of James Stewart, introduced by Plaintiff Hart, and proof of heirship given in evidence by plaintiff (record p. 29) and introduced 1st Affidavit of defendants that the deed of April 12th 1854, purporting to be a deed from W. H. and Jno. T. Stewart to J. De Cordova offered in evidence by plaintiff was a forgery (record p. 18), and defendant's disclaimer thereunder (record p. 30) which the court refused to consider, and which refusal is assigned as error. 2nd. Deed of Catherine Stewart and others as heirs of James Stewart (W. H. and J. T. Stewart being dead, record p. 28) to defendants Cox and Tinsley, conveying the land described in Patent No. 379 which chain of title the court held plaintiffs in error were estopped from proving, which ruling is assigned as error. 3rd. Deed of J. De Cordova by administrator to Cox, dated May 29th, 1884, and deeds from Cox to Tinsley and Echols (record p. 29) had been already introduced by plaintiff.

Assignments of Error.

The questions involved and the manner in which they are raised are fully shown in the specific assignments of error relied on and urged by plaintiffs in error.

The fifth error assigned relates to the second and third and will dispose of the whole case should the court, decide the position of plaintiffs in error well taken.

They assign as error the refusal of the Court to render judgment upon the first verdict found by the jury under the positive charge of the Court to so find, and should this Court so hold, the judgment of the lower Court will be reversed and judgment will be entered here upon the verdict for plaintiffs in error, who were defendants below.

First Assignment of Error.

The Court erred in overruling the motion for continuance made by plaintiffs in error as follows:

"Now comes defendant Thomas Tinsley, who for

himself and his codefendants, so far as they may claim the benefit of the continuance herein prayed for, and on oath says that there is on file among the papers of this cause a copy of a deed, of which the plaintiff has given the defendant notice, purporting to be the act and deed of Wm. H. Stewart, J. T. Stewart and Catherine, purporting to convey the land described in patent 379, vol. v., situated in McLennan county, Texas, of date 12th day of April, 1854, being the only deed or copy of deed which answers the above description. Affiant on oath further says that this is the deed through which the plaintiff claims chain of title to the sovereignty of the soil, and further that, if the same is a forgery the plaintiff has no title to the land in controversy. Affiant further says that the only party or witness to said deed known to this affiant is Mrs. Catherine Stewart, one of the purported grantors in said purported deed, and further, that she is a resident of the city of Baltimore, and that her deposition is on file in this cause, taken by the plaintiff; that in said deposition, the plaintiff does not ask any questions attempting to show the identity of said Mrs. Stewart as a grantor in said deed, or any question by which she is called upon, or in answer to which she was put upon notice or could lawfully say that she did not execute the said deed. Affiant further says that he met and had a conversation with said Mrs. Stewart, said purported grantor, on Saturday the 16th day of November, 1889, in the city of Baltimore, Md., during which conversation affiant by her statement was led to believe and does believe said deed to be a forgery, and that her evidence concerning the same will be material; that affiant at once left said witness in the city of Baltimore on said 16th day of November, 1889, and as soon as he could after due consideration files this his motion for continuance in this cause, and represents that he has not, nor would have, had time since arriving here to do more than prepare papers and give the five days notice necessary to take the said Catherine Stewart's deposition before the trial of this cause, which is set for trial on Nov. 27th, 1889.

"Affiant further states that the testimony of said

witness is material and he has used all diligence which he could use to advise his counsel of the facts, but the time between said conversation and the trial is too short to use any diligence further than to at once travel all the way from Baltimore to your Honor's Court to present the facts, and enter this his first application for continuance." Bill of exceptions No. 1 (record p. 18).

Statement.

The deed referred to was attacked as a forgery (record p. 31) by defendants and was thereupon offered by plaintiffs as an ancient instrument (record p. 21).

It was a link in plaintiffs' chain of title (record p. 28) and there was no evidence showing possession under it or any other act under it, such as to give it standing as an ancient instrument (record p. 31) the court so finding.

An affidavit of forgery was made and filed by defendants (record p. 31). No witness or circumstance tended to sustain the deed, (record p. 31).

The defendant expected to show by the absent witness that the deed was a forgery (record p. 18). It was defendant's first application for continuance (record p. 19).

Argument.

The defendants had had no previous knowledge of the existence of the fact that the pretended deed of Stewart's heirs to De Cordova was a forgery, the evidence was material and great diligence was shown by defendant Tinsley in at once coming from Baltimore to Texas to prepare a motion for continuance. This was all he had time to do.

Second Assignment of Error.

The court erred, (1) in admitting in evidence over objection of plaintiffs in error, said deed purporting to be from the heirs of James Stewart to J. De Cordova, Bill of exception No. 2 (record p. 21) and (2) in refusing to exclude the same from the jury after the same had been introduced over defendant's objection, Bill of exception No. 5, (record p. 28 et seq.) and (3) in refusing to charge

the jury as requested by defendants, submitting to the jury the issue whether or not the said deed was supported by evidence sufficient to sustain it as an ancient instrument, Bill of exception No. 7, paragraph 1 and 2 (record p. 33) and (4) in charging the jury that the only issue before the jury was whether the land sued for was the land described in the Marshall deed, thereby excluding the issue of defendant's attack upon the forged deed. Bill of exception No. 3 (record p. 35 and 36); (5) in holding defendants were estopped to deny the genuineness of said deed by reason of the common source of title in De Cordova in claiming through whom the plaintiff contended the defendants were forced also to claim through the said forged deed, although they disclaimed holding under or relying on title through it, and filed an affidavit that it was a forgery. Bill of exception No. 5 (record p. 30).

First Proposition under Second Error.

The deed from William H., J. T. and Catherine Stewart, was not admissible in evidence, as an ancient instrument, this being the only ground upon which it was offered.

Statement.

This deed, of date 12th April, 1854, was in regular form, except the form of the certificate, which is shown in full in bill of exception No. 2 (Rec., 22); the objection being that the parties signing were not identified—the language on this point being, "personally appeared Wm. H. Stewart and Catherine, his wife, and John T. Stewart, well known to me to be the individuals described as, and professing to be, the parties of the first part," etc.; the second objection being that the copy introduced did not show that any seal of the officer was on the original.

These objections became material when the instrument was introduced as an ancient instrument, and the only evidence of proper custody being the fact that it had been recorded. If improperly recorded, it was not admissible as an ancient instrument, our contention being that without identification of the parties signing, and the

use of seal by the officer, it was never properly authenticated for record.

Authorities.

A certified copy cannot be introduced as proof of an ancient instrument unless duly registered, of which registry and identification of the grantors is part.

Holmes vs. Coryell, 58 Texas, 685.

Hill vs. Taylor, 77 Texas, 295.

Second Proposition under Second Error.

The mere fact that an instrument is more than thirty years old, unaccompanied by any proof of acts of ownership under it, will not give it standing as an ancient instrument.

Statement.

This instrument was more than thirty years old. There was filed an affidavit of forgery. There was no proof whatever of any act of ownership under it. No proof of possession nor of payment of taxes, nor of any act indicating that the plaintiff was asserting title to the land. Therefore, our contention is that when the plaintiff had rested his case without making any proof of this character, the defendants' motion to exclude the said deed from the jury should have been sustained.

This Court will observe, as is fully shown in bill of exceptions No. 6 (Rec., 31), that the trial Court entertained this view of the law and the facts, but upon reflection held that the defendants were estopped to deny the genuineness of the deed, because it was a link in the chain leading up to J. De Cordova, who the plaintiff claimed was common source of title. Therefore, we are led to the discussion of this holding of the Court.

Third Proposition under Second Error.

A defendant who has not committed himself to the common source by pleading his title is not estopped from impeaching the common source, nor from establishing his title otherwise than through it.

Statement.

The pleadings were in the ordinary form of trespass to try title. Neither party had pleaded their title.

Plaintiff, in order to show common source, put in evidence copies of defendant's title (Rec., 29). This was done under Art. 4802, Statutes of Texas, as follows:

"It shall not be necessary for the plaintiff to deraign title beyond common sources, and proof of a common source may be made by the plaintiff by certified copies of the deeds showing a claim of title to the defendant emanating from and under the common source."

A full history of the proof will be found in bill of exceptions No. 5 (Rec., 28, 29 and 30)—the issue arising clearly upon the successful effort of the defendants to break the link in plaintiffs' title between the alleged common source and the sovereignty of the soil, the benefits of which successful effort the Court refused to allow the defendants to enjoy—holding defendants estopped from going beyond the common source.

Fourth Proposition under Second Error.

A defendant may purchase, rely upon, and go into possession, under a deed emanating under common source, and in good faith make valuable improvements, and justly regard his as the superior title, but when convinced that neither he nor the plaintiff have the title, may impeach the plaintiff's title as a forgery, and buy up the true title and defend under it, as against the plaintiff, and assert his claim for improvements, made in good faith under the prior title, yet on the trial assert he has since found the same to be forged.

Statement.

These defendants went into possession under title through the administer of J. De Cordova's estate.

Plaintiff claims through the Marshal's deed—made during De Cordova's life time—De Cordova having purchased from the Stewarts. Defendants claim to be possessors in good, having made valuable improvements.

A few days prior to the trial defendants reached the

conclusion that the Stewart deed to De Cordova, of 1854, was a forgery, and they take title directly from the Stewart heirs (Rec., 29).

After reaching the conclusion that defendants could not impeach the common source, the trial Court ignored this title of the defendants, as shown by his charge, bill No. 8 (Rec., 35).

Authorities.

Burns vs. Goff, 79 Texas, 239.
Connolly vs. Hammond, 51 Texas, 649.

Argument under Second Assignment.

The defendants contend that this deed was not admissible in evidence as an ancient instrument:

1st. Because it was not properly proved up for record, and not properly recorded.

2d. It being unaccompanied by proof of any act of ownership, it was not admissible and should have been excluded.

3d. That the Court was in error in holding defendants estopped.

No length of time will render admissible in evidence, as an ancient instrument, a certified copy of a recorded deed which was not properly acknowledged, and was improperly registered. See Hill vs Taylor, 77 Texas Reports, 295; 60 Texas, 360; 66 Texas, 468.

An instrument over thirty years old, coming from proper custody, free from suspicion, and under which some act of ownership has been asserted, is admissible. Gainer vs. Cotton, 49 Texas, 102; 59 Texas, 503.

Does the plaintiff meet this rule?

The rule which renders it unnecessary for the plaintiff to deraign title beyond common source is "one of convenience," and does not deprive a defendant of the right to show that he has the superior title, through the common source or otherwise. Burns vs. Goff, 79 Texas, 239.

A defendant's right to compensation for his improvements does not depend upon the intrinsic goodness of his

title, but upon the good faith of his possession and claim of title. Dunham vs. Dorn, 24 Texas, 379; 57 Texas, 273; 46 Texas, 409.

The question of the good faith of the defendants in their entry and possession was settled by the jury under proper instructions from the Court, and is not now a mooted question. And the merits of the title under which they entered, about which they were deceived, is a matter of no consequence. It was their *belief* in its merits that made them good faith possessors, and we do not understand the law to be that defendants thus situated, when they learn the weakness in their own title and that of their adversary, that they are estopped from impeaching their adversary's title and buying the genuine title, *because they once, in good faith, entered under the defective title and made improvements.*

To illustrate the harshness of a contrary rule: Defendants purchased a title and in good faith made improvements. Hart sued them, claiming the superior title, which defendants were advised was void, if for no other reason, because the Marshal's deed to Hart was void, but as matter of diligence defendants at once began investigation as to the merits of the title, and just before final trial found that the title was still in Stewart's heirs, De Cordova, the common source of title, having obtained his title through a forged deed. Defendants bought up the genuine title from Stewart's heirs. Can it be asserted that in the contest between plaintiff and defendants that, by reason of the fact that the title under which Hart claims and the one under which defendants went into possession culminates in a common source, that defendants are estopped from impeaching Hart's title beyond this source, and can they not set up the real title which they have purchased?

Defendants, in possession, defeated, and the plaintiff wins when the plaintiff has no title upon which to recover, and this because the defendant was deceived as to the title under which he went into possession.

Of course, if the defendant pleads his title and it culminates in common source with plaintiff, he is bound

by his pleadings, and must show superior title under the common source or lose; but such is not the case at bar.

We are, therefore, led to the conclusion that when the trial Court found no evidence to sustain this deed as an ancient instrument, he should have excluded it from the jury, and charged the jury to find for defendants and have entered judgment for them, or he should have submitted its genuineness, as a matter of fact, to the jury.

The attention of the Court is particularly drawn to page 30 of the record, under 4th subdivision, where the theory and claim of the defendants may be found clearly stated: "The title through Mrs. Stewart of Nov. 16, 1889, is the superior title until some other title is shown superior to it, which burden of proof is thrown upon the plaintiffs by the affidavit of forgery." This was the claim of defendants before the trial, as is shown by their filing affidavit of forgery, and it was their claim on the trial as shown by their objections (record p. 23).

The defendants did not claim title through De Cordova. It is true the record on page 29 states that the defendants introduced a deed under De Cordova to show "title and good faith improvements," being part of bill of exception No. 5. This bill was prepared by the Court who here embodies a statement which, it is most respectfully submitted, is shown to be contradicted by the affidavit of forgery, the above objection on page 30 subdivision 4th of the record and the whole case of the defendant.

Even should it appear that the defendants stated they introduced title papers under De Cordova, it is clear such title was introduced only with reference to good faith improvements, showing they once believed in the validity of the title and made improvements in good faith based thereon.

The defendants could gain nothing by claiming title under De Cordova except on the issue of good faith improvements.

As to title as such, if the Marshal's deed from De Cordova to Hart was valid, all title had passed out of De

Cordova before his death, and his administrator's deed was waste paper.

If the Marshall's deed was void the plaintiff would have failed to make a prima facie case and the defendants would have recovered at all events.

In either case, the defendants could not have gained anything by their administrator's deed from De Cordova; and the whole record upon fair construction shows the defendants neither pleaded the De Cordova title nor relied on it, except upon the issue of good faith improvements.

But should it be shown they did rely on it, the rule of common source is "one of convenience" and does not estop defendants from claiming under their superior title from the heirs of Stewart. Burns vs. Goff, 79 Tex., 249. And especially so when plaintiff did not rely on common source, but attempted to trace his title from the sovereignty to himself by complete chain.

Third Assignment of Error.

The court erred (1) in admitting in evidence the deed from De Cordova by United States marshal, Wm. C. Young to plaintiff Hart, Bill of exception No. 3, (record p. 24, 25 and 26), (2) and in refusing to exclude said deed from the jury on motion of defendants below, the said motion being made after the plaintiff had closed his evidence, Bill of exception No. 4. (Record p. 26 and 27, and map 47a) and (3) in refusing to give charge No. 6, asked by defendants, instructing the jury to consider the patent only in aid of said deed, Bill of exception No. 7, (record p. 33) and refusing to charge the jury as requested by defendants that in a marshal's deed no intendment of the officer can be presumed, Bill of exception No. 9 (record p. 34) and (4) in charging the jury that the "amount of land, the number of acres being different in the deed from that in the patent, you are only to consider as a circumstance in connection *with all the other proof* in your inquiry as to whether the description in the marshal's deed does describe either one of the two James Stewart surveys" * * * "because the

Court did not limit the jury to the description in said deed and papers referred to in said description, but left them to take into consideration all the evidence in aid of said defective description." Bill of exception No. 8 (record y. 35 and 36).

Statement.

In the said deed from J. De Cordova, by the United States marshal, to E. J. Hart and others (copied in full record p. 24) reciting the levy of execution the marshal says: "I levied the same on the 16th day of August, 1858, on a certain tract, or parcel of land as the property of said J. De Cordova, *containing by estimation, eight hundred and ninety-eight acres* (898) of land, lying in Milam land district, and county of McLennan aforesaid, on Cow Bayou and Bull Hide streams, *patented to the heirs of James Stewart, for nine hundred and sixty* (960) *acres*" and he conveys "all the right, title and interest of Jacob De Cordova in said tract of land of *eight hundred and ninety-eight acres* for the consideration of two hundred and ten dollars" (record p. 24). No additional description of the land is contained in the deed.

Two patents to the heirs of James Stewart for 960 acres of land were in evidence, patent No. 379, volume V., and patent No. 380, volume V, (record p. 25).

Defendant in error, E. J. Hart, claims that the marshal's deed describes the land granted by patent No. 379, volume V., of which plaintiffs in error are in possession.

Plaintiffs in error claim the marshal's deed describes no land, and, if any, certainly not the land of which they are in possession. By actual measurement under survey made by order of the Court, patent No. 379, *includes 1280 acres* of land (record p. 26, map 47a). Adjoining the land granted by patent No. 379, is the survey granted to the heirs of James Stewart by patent No. 380, volume V. (record p. 26, map 47a). This tract, by actual measurement under the survey made by order of Court, *contains 897 acres* out of conflict (record p. 26, may 47a).

The marshal's deed conveys a tract containing, *by estimation, 898 acres* (record p. 24).

Patent No. 379 describes the land as being, "on the *waters* of Bull Hide creek," (record p. 26), not on the *streams* themselves. Patent No. 380 describes the land as situated "on Bull Hide *creek*," that is on the stream itself, (record p. 25). The marshal's deed describes the land as situated "on Cow Bayou and Bull Hide *streams*" (record p. 24).

The map shows (the land granted by) patent No. 379, of which plaintiffs *in* error are in possession, is not situated on either stream (record p. 26). The evidence shows that the *waters* from the land granted by patent No. 379, flows into Cow Bayou on the West, and Bull Hide creek on the east. The map shows these streams to be nearly a mile distant from the nearest boundaries of the land described in patent No. 379 (record p. 26).

The marshal's deed does not so describe the land as to identify it by the language of the deed itself (record p. 26).

The deed does not describe by number, or otherwise, any other writing, from which a description of the land conveyed by notes and bounds may be supplied, unless the words "patented to the heirs of James Stewart for 960 acres," are sufficient for identification of such a writing (record p. 24). There is no reference to any record or archive to which application may be made for a copy of the patent, if the above description is sufficient to identify any particular patent (record page 24).

The deed conveys only "said tract of land of eight hundred and ninety-eight acres" (record p. 24). The description of "said tract" referred to is vague as to the quantity of land levied upon, it being "a certain tract or parcel of land * * * containing, *by estimation, eight hundred and ninety-eight acres*" (record p. 24).

There are no field notes showing what 898 acres, out of the 960 acres, were levied on and sold by the marshal, nor any description by which the 898 acres could be identified (record p. 24).

The levy was made upon a tract of land "containing, by estimation, eight hundred and ninety-eight acres," which tract of eight hundred and ninety-eight acres was sold, not the 960 acres described in patent No. 379,

volume V, (record p. 24 and 25), or in any other patent. The description of the levy and sale does not, with certainty, identify patent No. 380, volume V, though plaintiffs in error claim it comes nearer describing the 897 acres, found actually to be out of conflict with older surveys, granted by patent No. 380, than the 1280 acres found actually to be contained in the field notes of patent No. 379, when surveyed upon the ground (record p. 35).

The theory of plaintiffs is that the Marshal was familiar with the land sold by him, and that he did not follow the description contained in any particular patent, but from his knowledge of the particular land itself, and his estimate that the tract contained only 898 acres, he levied upon and intended to sell, and did sell, that particular survey which contained 897 acres and not the one containing 1280 acres (record p. 26, and map 47 a).

The theory of plaintiffs in error is that there is a variance between the attempted description of the land in the Marshal's deed and the description of the land in patent No. 379, in that, the deed fixes the location of the land attempted to be conveyed on both Cow Bayou and Bull Hide creek *streams*, whereas the land described in patent No. 379 is situated nearly a mile from either stream (record p. 38).

The theory of the plaintiffs in error further is, that the attempted description in the Marshal's deed is insufficient to identify any lands unaided by other evidence, and that the expression used in said deed "patented to the heirs of James Stewart for 960 acres" can alone be looked to in aid of the lack of description by metes and bounds. That this expression is insufficient to identify any particular patent, and that this failure to sufficiently identify the patent referred to by apt language is fatal to the deed, and cannot be aided by traveling in a circle back to the imperfect description of the land, thereby projecting a search for a patent, which may contain language accurately locating some land, which language may nearest approximate the utterances of the deed, themselves confessed to be so vague as to fail in themselves to identify any land. In other words, if the deed described land there would be no need to refer to any patent, if it

fails to sufficiently describe any land, a patent cannot be identified by reference back to the deed for comparison with the description of land which the deed has failed to sufficiently describe. The deed failing to describe any land, a patent called for in the deed cannot be identified by comparing its terms with the insufficient description in the deed any better than the land itself is identified by the deed. If the description of the land in the deed is insufficient to identify the land, the undescribed land is insufficient to identify the patent by reference thereto. The land insufficiently described in the deed could not by comparing it with the land granted in the patent serve to identify the patent (record p. 39).

The theory of plaintiffs in error further is that either of the patents in evidence will satisfy that part of the description "in Milam Land District and County of McLennan aforesaid * * * patented to the heirs of James Stewart for 960 acres," and that the only other words of the deed which serve to distinguish patent No. 379 from No. 380 are the words "a certain tract or parcel of land * * * containing by estimation eight hundred and ninety-eight (898) acres of land * * * on Cow Bayou and Bull Hide streams." And that these words exclude patent No. 379 and the land granted therein by reason of the great variance between the 1280 acres shown by the survey to be granted by said patent and the 898 acres called for in said deed, and especially so since patent No. 380 contains 897 acres, a number of acres out of conflict corresponding within one acre, to the estimate of the Marshal—the actual acreage being 897 acres (map 47 a) and his estimate being 898 acres! And that said words exclude and are at variance with both these patents because neither of said grants of 960 acres lie upon both of said streams, the nearest boundary of the land granted by patent No. 379 being nearly a mile from either stream, and the land granted by patent No. 380 being on Bull Hide creek alone (record p. 26, map 47, a).

The theory of plaintiffs further is that if the land is not described in the deed and no written instrument is referred to in the deed sufficiently described to be itself

identified the deed is void and passed no title out of De Cordova, if he ever had title, for the reason that a deed by a Marshal under forced sale must describe the land by metes and bounds, or refer to some written instrument for such description, and no other description can be considered than such as is contained in said deed itself and the written instruments referred to in the deed with such certainty as to be identified. No general reference to records will meet the requirements of the law.

Such was the theory of plaintiffs in error (record p. 38).

First Proposition—Third Assignment.

The Court erred in admitting in evidence said deed from J. De Cordova, by the Marshal, to E. J. Hart and others, over the following objections made to its introduction by plaintiffs in error :

1st. It contains no sufficient description of any lands or of any written instrument from which a description of the land may be had (record p. 25).

2nd. If the expression "patented to the heirs of James Stewart for 960 acres" is construed to be a reference to a patent, there was in evidence before the Court when this objection was made two patents, satisfying fully this vague reference to a patent made in the deed (record p. 25) rendering it impossible to determine which patent to select as the one referred to in the deed, if either (record p. 25).

Authorities.

"No estate of inheritance in lands shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing," &c. Revised Statutes of Texas, Art. 558.

"There is a broad distinction to be observed in the rules of construction applicable to deeds between private persons and those of a sheriff, made by virtue of an execution sale." Brown vs. Chambers, 63 Tex. 135. "As to the latter no presumption will be indulged, but the conveyance must contain such a description as will enable the purchaser to find and identify the land." Id. p. 135.

"Or *instruments therein referred to* must with reasonable certainty identify the land." Id. p. 135. "A reference by the sheriff to the county *records generally* for a description and identification of the land sold and conveyed by him under and by virtue of writs of execution could hardly be deemed sufficient. The saction of such a practice would result in interminable difficulties in reference to the description of lands levied upon and sold under writs of execution, and would result also in a *great sacrifice* of landed property when offered at sheriff's sales." Brown vs. Chambers, 63 Tex. 134.

See Brown vs. Chambers, 63 Tex., 131, for the fullest discussion of this question contained in the Texas Reports.

There being a defect in the sheriff's deed, the U. S. Supreme Court says: "Certainty in such a case is necessary to make the sale valid, for on the form of the acre the value may depend. And there is nothing *on the face of the deed* or in the proceedings *previous to sale*, which supplies the defect." Ballance & Forsyth, 13 How., 23.

Argument.

The Court below confused the rule governing transactions between parties acting for themselves with the rule governing deeds executed by officers under forced sales.

In the first place great latitude is given the investigation and if the land can be identified by extrinsic evidence the deed will be supported. This doctrine was for a long time disputed on the ground that the deed itself should alone speak the intent of the parties thereto. It seems, however, evidence *aliunde* may be considered to support a deed *between parties* contracting for themselves.

But there has never been either reason or precedent for such latitude in deeds under forced sales.

The rule is well defined. The deed itself must describe the land, or refer to some instrument from which this description may be had.

The deed in question, it is conceded, fails to suffi-

ciently describe any land. It is claimed this defect is cured by reference to a patent.

There is no such reference in terms to any patent. As attempted description of the land it is recited that the Marshal levies on 898 acres of land, patented to the heirs of James Stewart for 960 acres. Nothing is said of whether the patent itself or a copy on file is to be looked to, where it may be found, or any statement describing the instrument itself.

No *general* reference to the records is sufficient says the Court in Brown vs. Chambers, *supra;* yet what could be more general than the expression "patented to the heirs of James Stewart for 960 acres?"

In a deed under forced sale, this defect being a *patent ambiguity*, was a question of law for the Court, and rendered the deed void upon its face.

But should the Court hold the words "patented to the heirs of James Stewart for 960 acres" such reference to a patent as would demand a search, then such search would develope two patents exactly meeting the description of the deed, unless the words "on Cow Bayou and Bull Hide streams" can be taken as descriptive of the patent for which search was being made. If so, both these patents would be excluded, and especially patent No. 379, as the land granted by it lies on neither stream.

To sustain Hart's claim the Court must reject this decription or explain it away and supply a description by intendment not contained in the deed.

"The sanction of such a practice," says the Supreme Court of Texas, "would result in interminable difficulties in reference to the description of lands levied upon and sold under writs of execution, and would also result in a great sacrifice of landed property when offered at sheriff's sale. Brown vs. Chambers, 63 Tex., 134.

To the same effect are numerous authorities, which would add nothing to the well considered case above quoted.

The Marshal violated every rule of certainty in this levy. He gave no metes and bounds, only estimated the number of acres, referred to no deed or chain of title, no record, book or page, and threw about his action every

vague and uncertain element which would detract from the value of the property offered, and perpetuated this vagueness by his further confining the granting clause of the deed to a conveyance of only 898 acres, instead of conveying the 960 acres. Let the Court free itself from the vague terms of the deed and apply the clear rule of law—that only the deed itself or instruments referred to in the deed may be considered in testing the sufficiency of the description of the land in the deed.

Second Proposition—Third Assignment.

The Court erred in refusing to exclude from the jury, on motion of the defendants below, the said deed of J. De Cordova by said Marshal to plaintiff Hart, after all the evidence for plaintiff had been introduced and was before the Court, for the following reasons:

1st. Plaintiff below confessed that the deed itself does not describe any land, but claims that a patent to the Heirs of James Stewart may be consulted for description. But the deed does not by its terms refer to any particular patent, making it a part of the deed for description, and unless this is done no patent can be consulted (Rec., 26).

2d. No specific patent by number, date or otherwise, is described or referred to, and it would require a search through the land office to find a patent to describe the land, rather than a search on the ground to find land to satisfy the field notes of a certain patent, and unless identified by the deed, the patent cannot be looked to in aid of a deed (made under forced sale) for a description of the land sold (Rec., 27).

3d. There are in evidence two patents to the heirs of James Stewart, granting land in McLennan county, each for 960 acres, and the Marshal's deed does not, by any expression or reference contained therein, show which of the two is meant, or in any manner identify the particular patent (Rec., 27).

4th. The expression "on Cow Bayou and Bull Hide streams" does not tend to identify which of said patents is meant—neither of them describing land situated on said streams (Rec., 27), and the land in contro-

versy is not situated on either of said streams, whereas the deed calls for land situated on both streams.

Authorities.

See first proposition, third assignment, especially Ballance vs. Forsythe, 13 How., 21.

Argument.

The Court having declined to exclude the deed on the objection of defendants when the same was offered, the defendants moved to strike the same from the file of evidence, for the several reasons last above set out. If correct in his first ruling, there is no ground upon which to sustain the ruling of the Court here complained of. All the plaintiff's evidence was in, and the defendant was called upon to present his case. Looking over the evidence, there was none which, under the rule of law, identified the land or the patent called for in the pretended Marshal's deed, and as a question of law, it become the duty of the Court to so declare, and to charge the jury to find for the defendants. The defendants so moved. The Court will entertain this practice where there is no conflict in the evidence, and at this stage of the trial there was no conflict. The plaintiff had failed to sustain his title; there was an absence of evidence—not a conflict.

In such case, the United States Supreme Court has ruled the Court should have entertained a motion, the facts being undisputed. Ballance vs. Forsythe, 13 How., 21.

Here the Marshal's deed and both the patents were before the Court, and neither satisfied the vague calls in the deed, if the location *on Cow Bayou and Bull Hide streams* is taken as a part of the description of the patent, for neither patent so locates the land. If this expression be excluded, then either patent will satisfy the calls in the deed—"patented to the heirs of James Stewart for 960 acres." If the further expression, "by estimation containing 898 acres," is considered, then patent No. 379

was excluded, for it was an undisputed fact before the Court, as shown by the record, that patent No. 379 included 1,280 acres of land, whereas patent No. 380 included only 897 acres—out of conflict. It become the duty of the Court to say that only the expression "patented to the heirs of James Stewart for 960 acres," tended to describe the patent; that the other words of the deed applied only to a description of the land, and not the patent, and that no patent was sufficiently described to be identified, and, as a matter of law, that the deed was void—there being a patent ambiguity. This view of the deed is urged upon the Court. But if there was no patent ambiguity, rendering the deed void on its face, when two patents to the heirs of James Stewart for 960 acres were introduced, and there was no patent number or survey number, or other words descriptive of the patent in the deed, so that it might be selected out of the vast issue of patents, the latent ambiguity becomes apparent.

Here the Court should have stopped the evidence and declared the rule of law that only instruments referred to in the deed can be consulted in aid of the defective description. Between parties contracting for themselves a latent ambiguity can be explained—so as to follow the intentions of the parties; but in an officer's deed, under forced sale, "no such intendment can be indulged." Brown vs. Chambers, 63 Texas, 135.

The Court should have been mindful of the rule at this stage of the trial, and have charged the jury to find for the defendants.

This charge the Court did give at a later period of the trial, and its effect upon the defendant's rights is discussed under the fifth assignment of error, which charge related back to this motion and should be given effect as if in response to this motion.

The Court below erred in not excluding this Marshal's deed, and in not charging the jury to find for defendants before requiring them to introduce any evidence.

Third Proposition—Third Assignment.

The Court erred in refusing to charge the jury as re-

quested by defendants below, that if the description of the land as contained in the Marshal's deed, will be satisfied by the description in one of the said patents as well as the other, they should find for the defendants, and that no intendment of the officer making the same can be presented, because this charge confined the jury to the deed and the only written instrument mentioned in the deed; and correctly required the jury to identify which patent was referred to in the deed, and prevented the consideration of the intentions of the Marshal, and the oral and documentary evidence including the patent not referred to in the deed, none of which last named evidence can be considered in aid of the Marshal's deed. Bill of exceptions No, 7 (record p. 33–6).

This proposition will be considered with the next proposition, exposing the error of the Court in positively instructing the jury to consider all the evidence before them in determining this issue.

Fourth Proposition—Third Assignment.

The Court erred in charging the jury that "the amount of land, the number of acres being different, in the deed from that in the patent you are only to consider as a circumstance *with all the other proof* in your inquiry as to whether the description in the Marshal's deed does describe either one of the two James Stewart surveys." * * * Because the Court did not limit the jury to the description in said deed and papers referred to in said description, but left them to take into consideration all the testimony and other deeds in evidence in aid of said defective description. Bill of exception No. 8 (record p. 36).

Statement Under Third and Fourth Proposition—Third Assignment.

The deeds from the heirs of James Stewart to J. De Cordova, and from Catherine Stewart to Cox and Tinsley, and from Cox and Tinsley to Echols, and rom the administrator of J. De Cordova to Cox were

all in evidence describing the land in controversy, granted by patent No 379, or parts of the land granted by this patent (record p. 28 and 29).

There was oral evidence that the water from patent No. 379 ran from its western portion into Cow Bayou and from its eastern portion into Bull Hide creek, and other evidence extrinsic of the deed and other writings not called for in the deed, including the report of surveyor Turner made by the Court; all of this extrinsic and uncertain evidence was permitted by the charge of the Court to be taken in aid of the Marshal's deed.

Authorities.

"The description contained in the sheriff's deed or deeds, or instruments therein referred to" may alone be considered by the jury. Brown vs. Chambers, 63 Tex., Ballance vs. Forsyth, 13 How., 21.

Argument.

The Court violated this clear, accurate rule of conveyancing. If put aside, the sale of lands under execution will be uncertain in the extreme. The law is as stated in the charge asked, confining the jury to the deed and a patent, if any patent is called for.

The law is not as stated by the Court in his charge which permitted the jury to look to every deed and every oral statement to see what, under the evidence before them, was probably the intent of the Marshal, not only under the facts by which the Marshal was surrounded but also under the vague, uncertain evidence delivered on the trial, through which the jury was asked to view a transaction of which no witness testified.

Either the rule laid down in Brown vs. Chambers is the law or it is not; and if not, what is, and where may it be found? If the rule stated there is the law the lower Court has erred, in a most material matter, to the great injury of plaintiffs in error.

Fourth Assignment of Error.

A defendant in possession who has made improvements

in good faith, and this fact is ascertained by finding of the jury, is entitled to judgment, under the Texas statute, for the value of his improvements so found, upon which execution will issue.

Statement.

In this case, the jury, under proper instructions from the Court, found defendants, Cox and Echols, to be possessors in good faith, and found for them the value of their improvements.

The decree simply recites the facts of the finding and the amounts awarded to each, but does not give judgment in their favor for the amounts so found. Rec., 13 and 14, and 41.

The Texas statute on this subject as found in Arts. 4813 to 4820, inclusive, of the Revised Statutes of Texas, and is as follows:

ART. 4813. *Suggestion of improvements in good faith.* The defendant, in any action of trespass to try title, may allege in his pleadings that he and those under whom he claims have had adverse possession in good faith of the premises in controversy, for at least one year next before the commencement of such suit; and that he and those under whom he claims have made permanent and valuable improvements on the lands sued for during the time they have had such possession, stating the improvements and their value respectively; and stating also the grounds of such claim. [Act Feb. 5, 1840; 4 Cong. p. 136; P. D. 5300.]

ART. 4814. *Issue as to.* Where the defendant has filed his claim for an allowance for improvements in accordance with the preceding article, if the court or jury find that he is not the rightful owner of the premises sued for, but that he and those under whom he claims have made permanent and valuable improvements thereon, being possessors thereof in good faith, the court or jury shall at the same time estimate from the testimony—

1. The value at the time of trial of such improvements as were so made before the filing of the suit, not exceeding the amount to which the value of the premises is actually increased thereby.

2. The value of the use and occupation of the premises during the time the defendant was in possession thereof (exclusive of the improvements thereon made by himself or those under whom he claims), and also, if au-

thorized by the pleadings, the damages for waste or other injury to the premises committed by him, not computing such annual value for a longer time than two years before suit, nor damages for waste or injury done before said two years.

3. The value of the premises recovered, without the improvements made as aforesaid. [Act Feb. 5, 1840; 4 Cong. p. 136.]

ART. 4815. *Rents and profits to be offset against.* If the sum estimated for the improvements exceed the damages estimated against the defendant and the value of the use and occupation as aforesaid, there shall then be estimated against him, if authorized by the testimony, the value of the use and occupation and the damages for injury done by him, or those under whom he claims, for any time before the said two years, so far as may be necessary to balance the claim for improvements, but no further; and he shall not be liable for the excess, if any, beyond the value of the improvements.

ART. 4816. *Judgment for excess, etc* If it shall appear from the finding of the court or jury, under the two preceding articles, that the estimated value of the use and occupation and damages exceed the estimated value of the improvements, judgment shall be entered for the plaintiff for the excess and costs in addition to a judgment for the premises; but should the estimated value of the improvements exceed the estimated value of the use and occupation and damages, judgment shall be entered for the defendant for the excess.

ART. 4817. *Writ of possession not to issue, unless, etc.* In any action of trespass to try title when the lands or tenements have been adjudged to the plaintiff, and the estimated value of the improvements in excess of the value of the use and occupation and damages has been adjudged to the defendant, no writ of possession shall be issued for the term of one year after the date of the judgment, unless the plaintiff shall pay to the clerk of the court for the defendant the amount of such judgment in favor of the defendant, with the interest thereon. [Act Feb. 5, 1840; 4 Cong. p. 136; P. D. 5301.]

ART. 4818. *On failure of plaintiff, defendant may pay, etc.* If the plaintiff shall neglect for the term of one year to pay over the amount of said judgment in favor of the defendant, with the interest thereon, as directed in the preceding article, and the defendant shall, within six months after the expiration of said year, pay to the clerk of the court for the plaintiff the value of the lands or tenements without regard to the improvements, as estimated by the court or jury, then the plaintiff shall be for-

ever barred of his writ of possession, and from ever having or maintaining any action whatever against the defendant, his heirs or assigns, for the lands or tenements recovered by such suit.

ART. 4819. *Defendant failing to pay, etc.* If the defendant or his legal representatives shall not, within the six months aforesaid, pay over to the clerk for the plaintiff the estimated value of the lands or tenements, as directed in the preceding article, then the plaintiff may sue out his writ of possession as in ordinary cases.

ART. 4820. *Judgment.* The judgment or decree of the court shall recite the estimated value of the premises without the improvements, and shall also include the conditions, stipulations and directions contained in the three preceding articles, so far as they may be applicable to the case before the court.

Argument.

Upon an affirmation of this decree, as it now stands the plaintiff can take his writ of possession and dispossess the defendants without compensation for their improvements, and they thus lose the same or they are forced to go into a Court of Equity to adjudicate their rights, which it seems the statute contemplates should be settled in the law case, there being no separate Courts of Law and Equity in Texas practice in the State Courts.

It seems from Art. 4816, above quoted that the judgment for the premises and the excess of rents over the value of improvements, in behalf of the plaintiff, stands on no higher ground than the judgment for the excess of improvements over the rent in behalf of the defendant.

The word judgment as used in legal enactments and in Courts has a clear and well defined meaning.

As used in Art. 4816, in speaking of the plaintiffs' rights, we would not hesitate to say that it means such a decree as will support an execution in his behalf, and when a plaintiff has recovered judgment for his lands and for the rent in excess of the value of improvements, all agree that in addition to his writ of possession he may have his execution for his rent. The point we press is that the word judgment in the statute is used in its ordinary meaning and was intended to support an execution in whose behalf it was rendered.

We do not understand the legislature to have intended that the plaintiff by failing to pay the value of the improvements, as he may do and get immediate possession, thereby discharges the judgment in defendant's favor and becomes entitled to the fruits of defendant's labor and money. A judgment of a Court in a defendant's favor for improvements made means nothing if he is not able to pay the value of the land. True the statute provides that at the expiration of 18 months, if the defendant has not paid for the land the plaintiff may have his writ of possession, but we do not think that settles the judgment against him in favor of defendants, our conjecture being that in such a contingency the plaintiff is entitled to his writ of possession and the defendant an execution on his judgment for improvements.

The question of the defendant's good faith having been adjudicated and the enhanced value of the plaintiff's land by reason of his expenditure thereon having been determined and the value of the land without this expenditure having been ascertained, their respective claims upon the property thus enhanced seems to stand on an equal basis of equality before the law and surely they do in a Court of Equity, and under our blended system, it occurs to us the legislative intention was to adjust the entire coutroversy in one proceeding.

The plaintiff may claim that under this rule he may be improved out of his title by having improvements of such value placed on his land that he cannot pay, so he may be deprived of his title by permitting a defendant to occupy five years under recorded deeds.

On the right of parties to compensation for their improvements in good faith, we refer the Court to full discussion of this question to be found in the following authorities :

Story's Equity, 2nd edition, 799a.

Bright vs. Boyd, 1st Stopy, 418, 494, and 2nd Story 605.

Pomeroy's Equity 1241, Notes Jones on Liens 1135.

Williams vs. Gibbs, 61 U. S. Reports, 1013.

In Texas cases see Saunders vs. Wilson, 19th Tex., 194.

Vanvolkenburg vs. Ruby 68th Tex., 139.

If this case is not disposed of on other issues we ask that the judgment be so reformed as to direct execution in defendant's favor.

Fifth Assignment of Error.

The Court erred in proceeding further with the trial of the cause after having closed the argument and charged the jury to find a verdict for defendants, and the jury had written, signed and returned their verdict for the defendants, and especially in refusing to enter judgment for the defendants on the said verdict. Bills of exception No. 6 and 10 (record p. 31 and 38).

Statement.

After the plaintiffs' opening argument and the defendant's whole argument to the jury had been made, and when the plaintiffs arose to conclude the argument the Court suggested to plaintiff's counsel in open court from the bench and in hearing of the jury that no proof of any act or assertion of ownership under the deed of the heirs of James Stewart to De Cordova had been offered; that such proof was necessary to entitle it to be considered as an ancient instrument, and that such being the Court's view of the proof, the plaintiffs could only elect to take a nonsuit or submit to have a verdict directed for the defendants, when the plaintiffs' counsel announced that the plaintiff would have to submit to have the Court direct a verdict for the defendants, and directed the clerk to prepare a verdict and any member of the jury to sign it as foreman, the jury remaining in the box. While this was being done, on a suggestion of plaintiffs' counsel that they be given further time to advise themselves whether they could safely elect to take a nonsuit, the matter was suspended by direction of the Court until after the noon recess, the hour for which had then arrived; and, at the reassembling of the Court after the noon recess, the jury being in the box, the court announced to counsel for both parties, that, on further consideration

during the recess, of the position taken by plaintiff's counsel at an earlier stage of the trial, that where a common source was shown a party could not go back of the common source to impeach a deed for forgery, was well taken and that the defendants, having themselves offered the deed from De Cordova's administer to Cox, and from Cox to Tinsley, and from both to Echols, were concluded on the question of common source and estopped to deny the genuineness of the deed from James Stewart's heirs to De Cordova, or it was immaterial whether said deed was genuine or not; and thereupon defendant's counsel was permitted to resume his argument to the jury, and when the plaintiffs' counsel had concluded the argument to the jury the Court charged the jury." Bill of exception No, 6 (record p. 31).

Whereupon the jury retired and brought in a verdict for the plaintiff Hart, upon which the Court entered judgment.

The defendants filed a motion to set aside judgment in favor of the plaintiff and enter judgment upon the verdict for the defendants, alleging, "That after the argument by defendant's counsel had been closed and plaintiffs' counsel in his closing argument had discussed the question of law, the Court held as a matter of law that said deed was not supported by sufficient proof to admit it before the jury as sufficient title, and gave the plaintiff the alternate choice of taking a nonsuit or of an instruction of the Court to the jury to find for the defendants; that the plaintiff chose the latter, and the Court charged the jury to find for the defendants, instructing the foreman to sign the verdict, which was prepared by the clerk, presented to the foreman, signed by him, and returned to the clerk of the Court, whereby the same became the verdict of the jury in said case, and the court had no further power to charge the jury or reject the verdict for defendants, the said verdict having been rendered in their favor, and the judgment is prayed to be entered thereon." Bill of exception No. 10 (record p. 38).

Said motion was based upon the charge of the Court instructing the jury to find for the defendants and pray-

ing the Court to sustain that charge because the deed to J. De Cordova purporting to be signed by the heirs of Stewart had not been proven before the Court either under the statute or as an ancient instrument (record p. 31) and because the Marshal's deed to the plaintiff Hart was void for want of description of any land, and certainly for want of description of the land of which defendants were in possession.

These grounds to sustain the charge of the Court and verdict of the jury for the defendants have been fully discussed in foregoing assignments of error numbered two and three, and are set out at length in the motion of the defendants filed in the lower Court, praying the Court to enter judgment for the defendants upon the verdict returned by the jury for them. Bill of exception No. 10 (record p. 38). The Court had charged the jury to find for the defendants, upon one of these grounds alone (record p. 38)—but both grounds existed (record p. 38) and this Court has before them these two grounds in assignment of error two and three.

The object of the motion in the Court below was to secure from the Court an entry of its judgment upon the first verdict for defendants and according to their contention—the only verdict of the jury (record p. 38).

The First Proposition Under the Fifth Assignment.

The argument had been closed, the plaintiff had been given the privilege of nonsuit, and the Court had charged the jury, and the verdict had been signed by the fore man which became the verdict of the jury, which the Court had no power to disturb by a subsequent charge. Such procedure would tend to confuse and mislead the jury.

Second Proposition Under the Fifth Assignment.

The Court below should have entered judgment on the verdict for the defendants, and it is respectfully submitted, that if the Supreme Court hold that in refusing so to do the lower Court erred, the judgment should be reversed and a judgment entered here, upon the verdict of the jury below, finding for the defendants.

Authorities.

"The verdict shall be in writing and signed by the foreman." Revised Statutes of Texas, Art. 1323.

Rule 1. All laws and rules of procedure and practice prescribed by the Legislature of the State of Texas as they now exist or as they may be changed or amended from time to time, when the same do not conflict with the law or a rule of the United States Court, are hereby adopted as the rule of practice of this Court, etc. Rule 1. Standing rules of U. S Circuit Court for the Northern District of Texas at Waco.

The verdict need not be incorporated in the judgment. McKinnon vs. Reliance Co. 63 Tex., p. 30.

No special form of verdict is required and where there has been a substantial compliance with the requirements of the law in rendering a verdict the judgment shall not be arrested or reversed for mere want of form therein. Revised Statutes of Texas, Art. 1334.

The judgment of the Court shall conform to the pleadings, the nature of the case and the verdict, etc. Revised Statutes of Texas, Art. 1335.

The Supreme Court of the United States will so far consider the facts of any given issue as to declare what the Court below should have ruled and will reverse and render the judgment here if the facts are undisputed. Ballance vs. Forsyth, 13 Howard, 21.

Argument.

Only one legal verdict can be rendered on any trial. If the cause has proceeded to verdict and there is error, the remedy is a new trial with a new jury.

The jury had performed their functions under a charge of the Court, having written and returned their verdict to the clerk. The Court having changed his opinion erred in instructing the jury to change their verdict. If the Court had failed to fix in his mind a clear conception of the law, which he had charged the jury was the law, it became his duty to grant the plaintiffs a new trial, the trial then at bar having been completed and merged into a verdict for the defendants.

Granting the Court had the right after charging the jury and after verdict to change his mind and reverse himself, and although the jury have been thereby led to believe the plaintiff should receive their favor in the second verdict, that the power existed in the lower Court to so transact his business, yet should the Supreme Court conclude that the merits of the case were reflected in the first verdict and that judgment should have been entered thereon, the rights of the parties and the ends of justice will best meet in the entry by this Court of a judgment upon the first verdict, thereby terminating litigation.

The defendants promptly objected to further proceeding with the trial and moved for judgment on the verdict for them.

The Court found that in fact the plaintiff had no title under the evidence. His title had been attacked as a forgery and he had failed to sustain it. He cannot tax the patience of this Court to listen to excuses. His refusal to continue the case for the purpose of investigating this very link in his chain of title estops him. He sheltered himself beyond investigation, beneath his anxiety for an early dispensation of justice. He urged a trial and was found wanting in evidence to sustain his claim, of which he had thought so slightingly that he had grudged the State her taxes and the soil the sweat of his brow for over thirty years, cheating both these of their dues.

No taxes and no act of ownership under a deed attacked as a forgery are the ancient muniments under which he claims.

The Court found the plaintiffs' title unsupported and charged the jury to find for the defendant's, who received the verdict of the jury, upon which judgment is now asked, at the hands of the Court?

The doctrine of estoppel alone saved the plaintiff in the lower Court; will it suffice to save him here?

The defendants did not claim title under De Cordova, as is shown by their persistent attack on his title as a forgery, notwithstanding expressions in the bills of exceptions, which were prepared by the Court upon the failure of attorneys to agree, would tend to suggest the contrary.

A fair interpretation of the record shows the defendants only claimed that when they went into possession of the land under the De Cordova title they did so in good faith, and afterwards learning of the forgery they ceased to claim that De Cordova's title was genuine and bought up the only true title.

Yet, if defendants continued to claim under the De Cordova title, it does not follow they claimed that his title came through the forged deed. He may have had other evidence of title, such as limitation or estoppel. That the defendants are charged with claiming under De Cordova does not fix, bind, nail and tie them hand and foot to a deed which they attack before the Court as a forgery and of which they ask the Court to rid itself as of an unclean witness.

If the Marshal's deed is valid, the defendant could gain nothing by claiming title under a junior deed from De Cordova, and if the Marshal's deed was void the plaintiff failed to make out his case. In either event there was no reason for defendants claiming title under De Cordova, and the bills of exception so suggesting must be read together with the whole record which shows the defendants did not stultify themselves by claiming under De Cordova's title.

Besides there is no privity between the plaintiffs and defendants upon which they can base an estoppel. The verdict for defendants may be sustained by the Court on a second ground.

Should the Court hold the Marshal's deed void, the plaintiff had no title and the Court correctly charged the jury to find for the defendants. The fact that the lower Court may have given a correct charge and failed to state all the valid reasons therefor in claiming the invalidity of the Marshal's deed, will not preclude this Court from sustaining the first charge and first verdict on this ground also, though not taken into consideration by the lower Court in this connection. The plaintiffs in error claim that the lower Court erred in proceeding with the trial after the first verdict, and that for this error the cause should be reversed.

They further claim that having reversed the errone-

ous judgment of the lower Court, it appearing that another, a legal and correct, verdict was returned by the jury, this Court should render judgment for plaintiffs in error on such verdict, adjudging them the title to the land in controversy.

Plaintiffs in error pray for reversal of the judgment below, and that this Court render judgment in their behalf.

Eugene Williams

Attorney, and of Counsel, for T. B. COX, THOMAS TINSLEY *and* S. E. ECHOLS.

Office Supreme Court U. S.
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APR 4 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 828.

T. B. COX ET AL. *vs.* E. J. HART.

Brief in Opposition to Motion to Set Aside Submission.

This cause was submitted on the 4th day of January, under the twentieth rule, on briefs for both sides, stipulation having been signed by counsel for the defendant in error, and by Mr. Williams, counsel for the plaintiffs in error. Motion is now made to set aside the submission by T. B. Cox, one of the plaintiffs in error, on the ground that he did not consent to such submission, and in support of the application Cox relies upon a statement of Mr. Scarborough, who also signed the stipulation, that "he signed the agreement to submit the cause without consultation with Mr. Cox, it never having been intimated to me that he desired delay or oral argument."

The sole counsel for plaintiffs in error entered here was Mr. Williams. Both he and Mr. Scarborough were counsel for the plaintiffs in error, defendants in the court below.

This Court must be governed by the appearances entered of record here, and must take it for granted that whatever is done by counsel is with the consent or approval of parties. It is not, and could not be, pretended by Cox that Mr. Williams did not have full authority to sign the stipulation as counsel here for all the plaintiffs in error.

It appears that one of the inducements for the plaintiffs in error to consent to submit was the undertaking by defendant in error to advance the money to pay for the printing of the record. The amount so advanced by Mr. Hart was $125. Cox, in his affidavit, said that he was not informed of the agreement for submission until the case had actually been submitted, but he does not state when he rereceived this knowledge, and it is almost impossible to believe that he did not follow up the case or become acquainted with the fact of the submission until the making of the present motion. If he knew of the submission either before or shortly after and took no steps in the matter, he cannot be allowed at this late day to say that the submission was originally without his knowledge. At all events, this Court cannot go into the question as to the degree of knowledge possessed by parties to the action when the proceedings resulting in the submission of the case are advisedly taken by their sole counsel of record.

We submit, therefore, that the motion should be denied.

In support of our statements we refer to an affidavit of Mr. Sleeper.

W. HALLETT PHILLIPS,
For Defendant in Error.

[Endorsed:] Cox *vs.* Hart. Submitted January 4, 1892. October 20, 1891, stipulation signed.

Affidavit of W. M. Sleeper.

THE STATE OF TEXAS, }
County of McLennan. }

I, W. M. Sleeper, being duly sworn, on oath state: I am agent and attorney for E. J. Hart, defendant in error in cause No. 828 of the U. S. Supreme Court, styled T. B. Cox *et al. vs.* E. J. Hart.

That on or about October 12, 1891, I acted as the agent

and attorney of said Hart in arranging the agreement between the parties to said cause to advance and submit the same under the rules of the U. S. Supreme Court.

That on or about said date Judge Eugene Williams, attorney for plaintiffs in error, proposed to me that plaintiffs in error in said cause would agree to advance said cause under the rules of the U. S. Supreme Court if E. J. Hart, defendant in error, would advance the money to pay for printing the record in said cause; that I communicated said proposition to W. Hallett Phillips, Esq., counsel in said cause for defendant in error, E. J. Hart, and was informed by him that said Hart accepted the said proposition of the said Williams and would advance the money to pay for printing said record, and said Phillips sent me an agreement to advance said cause, to be signed by the counsel of plaintiffs in error in said cause.

That I thereupon notified said Williams and J. B. Scarborough, Esq., that the proposition made by said Williams to advance said cause had been accepted, and presented to them the agreement sent me as aforesaid by said Phillips, which they both then and there signed as attorneys for the plaintiffs in error, and I returned the same at once to W. Hallett Phillips, Esq.

W. M. SLEEPER.

Signed and sworn to before me this March 31, 1892.

[SEAL.] J. H. FINKS,
U. S. Commissioner.

Office Supreme Court U. S.
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DEC 23 1891
JAMES H. McKENNEY.
CLERK

Supreme Court of the United States.

No. 828.—Submitted.

COX ET AL. *vs.* HART.

Brief of W. Hallett Phillips for defendant in error.

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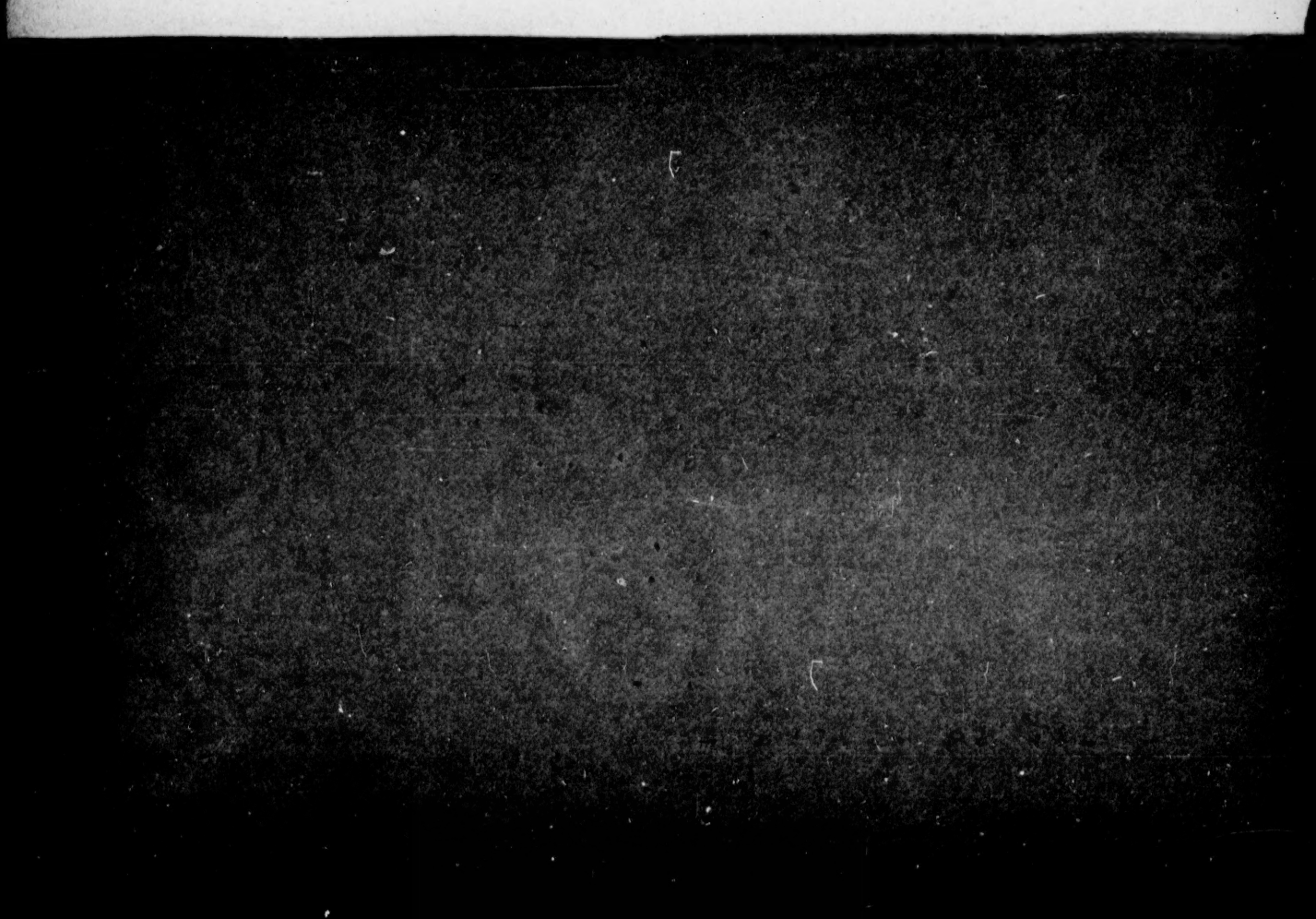

Supreme Court of the United States.

No. 828.—Submitted.

COX ET AL. *vs.* HART.

Brief of W. Hallett Phillips for defendant in error.

The case is one as to the ownership of land situated in the State of Texas.

The suit was brought by Hart. His title was derived from a purchase at a judicial sale and the deed of the marshal thereunder, dated September 7, 1858.

This conveyed to Hart & Co. "a certain tract or parcel of land as the property of J. De Cordova, containing by estimation eight hundred and ninety-eight (898) acres of land, lying in Milam land district and county of McLellan aforesaid, on Cow bayou and Bull Hide streams, patented to the heirs of James Stewart for (960) nine hundred and sixty acres." (R., 24.)

All the title thereby conveyed having been acquired by E. J. Hart, he brought his action of trespass to try title to recover the land in controversy, held by defendants.

The defendants set up title by virtue of a deed to Cox made by De Cordova's administrator in 1884. They also produced a deed to Cox made by the heirs of James Stewart in 1889.

There was a verdict and judgment in favor of Hart for the

land claimed, the defendants being allowed their improvements.

The principal question is whether the plaintiff showed title by virtue of the deeds introduced by him.

Besides the marshal's deed, the plaintiff offered in evidence a certified copy of the original deed from the heirs of James Stewart to J. De Cordova, dated April 12, 1854, and recorded May 8, 1854. The production of the original was waived, and the copy was admitted by the court as an ancient instrument.

This deed conveyed to De Cordova "nine hundred and sixty acres of land situated and being in Milam district, on the waters of Bull Hide creek and Cow bayou" (here follows particular description), "the above-described lands being the same which were granted to the heirs of James Stewart, deceased, under a patent from the State of Texas, No. 379." (R., 21.)

The plaintiff also introduced in evidence the above patent. (R., 28.)

The defendants objected to the introduction of the marshal's deed on the general ground that it failed to identify the land sued for.

The Stewart deed to De Cordova was objected to on other grounds.

Both deeds were admitted, and out of their admission arise the principal questions.

THE MARSHAL'S DEED.

One of the reasons for the objection urged by the defendants, to the marshal's deed was on the ground that "the record in this cause at the time this objection was made disclosed the fact that there were two patents to the heirs of James Stewart for 960 acres each," and reference is made to such alleged patents as well as to a map.

The bill of exception ends with this statement: "Of these

facts and this record and the following map the court will take judicial knowledge." (R., 26.)

Why the court should take judicial notice of matters the proper subjects of evidence does not appear.

Stating those matters as among the *reasons* why an exception should have been allowed, cannot have the effect of bringing them before this Court.

Where error is assigned the bill must set forth so much of the evidence as tends to prove the facts out of which the question is raised, and unless the facts are shown by the evidence, the assignment will be overruled.

Counsel cannot in their requests assume the existence of facts and ask a charge thereon, nor upon argument in this Court, insist that because this assumption was made the Court is to consider the assumed facts as existing.

The bills of exception, which are argumentative throughout, are open to this criticism.

Ins. Co. *vs* Baker, 94 U. S., 610.

Should the Court consider the question attempted to be raised as properly before it for decision, we submit that the jury properly came to the conclusion, that the description in the marshal's deed covered patent No. 379, and therefore embraced the land in controversy.

On this point the court charged the jury as follows:

"Whether the marshal's deed is a deed to No. 379 is the question for you to determine; whether it is described with sufficient distinctness, taking the description in the patent and deed. It conveys the whole grant if it conveys any. The amount of land, the number of acres, being different in the deed from that in the patent, you are only to consider as a circumstance, in connection with all the other proof, in your inquiry as to whether the description in the marshal's deed does describe either of the two James Stewart surveys. The burden is on the plaintiff. You must be satisfied from the proof given that No. 379, the western Stewart grant, is the land described in the marshal's deed before you can find for the plaintiff. If the proof satisfies you that the land the

marshal describes in his deed as lying on Bull Hide and Cow Bayou streams is the western Stewart No. 379, then the plaintiff is entitled to recover; if otherwise, the plaintiff cannot recover, and your verdict must be for defendants." (R., 35.)

The defendants' title from J. De Cordova's administrator by deed dated May 29, 1884, embraces the same land claimed by plaintiff, being the land covered by the Stewart patent No. 379. (R., 29.)

De Cordova was therefore the common source of title.

Defendants also produced a deed purporting to be from the heirs of Stewart, and dated *November* 16, 1889.

This was long after suit was instituted and a few days before trial.

There can be no question but that the plaintiff possessed the superior title if the land in controversy was conveyed in the marshal's deed.

As the defendants derived title from De Cordova, the common source, the court rightly held they were estopped from attacking the deed from the Stewarts to De Cordova. "When plaintiffs showed a common source of title with the defendants, if plaintiff's title under the common source was the superior title, the burden of proof was shifted on the defendants to prove any fact that would defeat plaintiff's right to recover." (R., 30.)

We do not deem it necessary to discuss each of the twelve bills of exceptions. Two of them relate to motions for a continuance and a new trial—matters not reviewable here, although assigned as error.

Other objections concern matters of fact which were correctly left by the court to the jury, and which are concluded by the verdict.

Bill of exceptions No. 7 contains a series of nine separate instructions which the court refused.

If the matter was correctly put to the jury by the charge given, the court was not bound to instruct further.

Besides, as many of the instructions asked were erroneous, the court was justified in refusing to give the series, and an exception to such a refusal will be overruled.

Indianapolis R. R. *vs.* Horst, 93 U. S., 291.
Ins. Co. *vs.* Muskogan Bank, 122 U. S., 511.

If the main objection to the title of the defendant in error is disposed of, there need be little consideration of the various other points raised by the plaintiffs in error.

The general objection to the marshal's deed is that, "unaided by extrinsic evidence not referred to in said deed, the description in said marshal's deed wholly fails to describe any land, that the same can be identified." (R., 26.)

It is said also that the deed does not refer to any instrument in aid of the defective descriptions; that if the expression "patented to the heirs of James Stewart" is to be taken as a reference to any particular patent, we are unable to determine which patent is referred to.

It may be stated as a general proposition, that in all that relates to the *description of the property* conveyed, the rule of construction is the same in all deeds, whether *inter partes* or by an officer of the court.

This tribunal has said that "the policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish."

The deed is never to be pronounced void for uncertainty of description, if the property intended to be conveyed can be reasonably located by means of that description. (White *vs.* Luning, 93 U. S., 523.)

The rule is not otherwise in Texas. The land may be

identified by reference to other deeds and even extrinsic evidence. (Wright *vs.* Lassiter, 71 Tex., 643.)

In Brown *vs.* Chambers, 63 Tex., 134, a reference was made in the sheriff's deed to other deeds for a description of a particular five hundred and thirty acres, but such reference afforded no aid in identifying the land. As to the general rule the court says :

"If from the description contained in the sheriff's deed or deeds or instruments therein referred to the land can be found and identified *with reasonable certainty*, then the conveyance will be sustained."

And reference is made to what is said by Martindale on Conveyancing: "Where a deed refers to another deed or a map or a survey, it has the effect to incorporate such deed into the description, the same as copied into the deed itself, and what is therein described will pass."

All that the Texas decisions prescribe, is that the description should be so definite, that the land can be identified with reasonable certainty.

Flannegan *vs.* Boggers, 46 Tex., 331.
Steinbeck *vs.* Stone, 53 Tex., 386.
Knowles *vs.* Torbett, 53 Tex., 557.

We must bear in mind, that in the present case, the evidence before the jury has identified the land described in the deed as the land sued for. It was a question of fact, for the jury to decide from the evidence *dehors* the deed, whether the boundaries called for include the premises in controversy. (Reed *vs.* Props, 8 How., 288.)

The objection really rests on the fact that the marshal's deed for a more particular description of the premises conveyed, refers to the patent to the heirs of James Stewart.

The marshal in his deed says that he "*levied* on a certain tract of land as the property of J. De Cordova," which he describes as containing by estimation 898 acres, "lying

in Milam land district and county of McLellan aforesaid, on Cow bayou and Bull Hide streams." It is this particular land which was levied on, sold, and conveyed to the plaintiff.

It is said we are forbidden to go beyond the marshal's deed to show the location of the land conveyed. It is also said that the reference in the marshal's deed for the purpose of identification of the land "as *patented* to the heirs of James Stewart" is not equivalent to saying, "see the patent to the heirs of James Stewart for description." (R., 27.)

This last objection is so frivolous as not to need consideration.

There is no rule of law which confines the jury in identifying the land described in a deed to the description contained in the deed itself, especially when reference is made to other deeds.

As observed by Chief Justice Marshall:

"It is undoubtedly essential to the validity of a grant that there should be a thing granted which must be so described as to be capable of being distinguished from every other thing of the same kind; but it is not necessary that the grant itself should contain such a description as without the aid of extrinsic testimony to ascertain precisely what is conveyed."

Blake *vs.* Doherty, 5 Wheat., 362.

The evidence shows that the land in dispute was patented to the heirs of James Stewart by patent 379, and the identical land so described was the property conveyed by them to De Cordova prior to the marshal's sale.

The marshal's deed conveys the land patented to the heirs of James Stewart, situated "on Cow bayou and Bull Hide streams."

This is the same tract embraced in patent 379, and described in the deed of Stewarts to De Cordova, as situated "on the waters of Bull Hide creek and Cow bayou." (R., 21.)

A refined distinction is attempted between the expression "on" and "on the waters," and it is said that the land sued for and described in patent 379 is not *on* either of the streams mentioned.

But it was shown that patent 379 is of a tract on the waters of those streams and is the same land as that sued for. (R., 26.)

This is sufficient.

The Stewart deed to De Cordova describes patent 379 and gives its particular boundaries.

The calls in the marshal's deed necessarily referring to the Stewart patent 379, and the Stewart deed, furnished all the necessary data for the location of the land.

The case is not one of uncertainity, much less of that patent ambiguity which required the deed should be excluded.

Deery *vs.* Cray, 10 Wall., 269.

If the defendants had shown by evidence, that the description in the marshal's deed could be referred to any tract but the land in dispute, a case would have been presented for the application of the rule stated by Chief Justice Tindal.

Miller *vs.* Travers, 8 Bingh, 244.

"In all cases where a difficulty arises in applying the words of a will or deed, to the subject-matter of the devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted or removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject-matter, really intended to be granted or devised."

This statement of the law is but an amplification of Lord Bacon's maxim, "An ambiguity which arises by proof of an extrinsic fact may in the same manner be removed."

Bac. Max. Reg., 25.

The rule is applied by this Court in Atkinson *vs.* Cummins, 9 How., 486.

In such cases, the words *do* describe the subject intended, and the extrinsic evidence only enables the court to determine what the parties understood to be signified by the description.

It has always been the rule in Texas that to warrant the court to exclude a deed from the jury it must be able to say from inspection of it that it was absolutely void, or that it was for other and different land than that claimed by the plaintiff.

Whatever effect the court might believe it should have in determining whether it described any land at all, or, if it did, in showing its proper locality, could be attained only by the action of the jury on it and such other testimony, as might be submitted to them.

Kingston *vs.* Pickens, 46 Tex., 101.
Rangsdale *vs.* Robinson, 48 Tex., 395.

In the present case, the proper course was adopted by the court below, in submitting the issue of fact as to the identity of the land, to be decided by the jury. The real complaint as shown by the bill of exceptions is, that the jury erred in finding the evidence sufficient to support a verdict for the plaintiff. (R., 16.)

Such a question is not reviewable here.

THE STEWART DEED TO DE CORDOVA.

A certified copy of this deed, which was over thirty years old, was offered in evidence by the plaintiff, and admitted against the objection of defendants.

It showed title to the land in controversy in De Cordova, the common source of title. The conveyance was from the patentees of the State.

The objection, so far as it related to the production of

a *copy* of the recorded deed without accounting for the original, was waived by the agreement between counsel as follows: "We agree that all title deeds in chain of title of plaintiff and defendants or *certified copies thereof*—originals and copies of patents relating to the survey in question and adjoining survey—may be introduced under the statute without filing notice or accounting for originals." (R., 23.)

Objection was also made on the ground that the acknowledgment was defective, but an inspection of the deed fails to disclose any defect.

The main ground of objection is stated to be that there was on file an affidavit of forgery, and that it devolved upon defendants to prove the genuineness of the original deed; that no proof of any act or assertion of ownership by De Cordova or plaintiff under the deed had been made, and so the copy was not proven as an ancient instrument, and as such was inadmissible in evidence. (R., 29, 31.)

It may here be observed, that though it is asserted that the deed of James Stewart to De Cordova offered in evidence was not proven up as at common law or properly introduced as an ancient instrument, such assertion is not supported by the record. The bill of exceptions does not purport to give all the evidence. What is shown on this point is stated in the "reasons" on which the defendants objected to the deed and upon which they based a motion to exclude the deed from the jury. (R., 29.)

The motion was overruled, but this was not tantamount to certifying that everything stated in the "reasons" was true.

The court held that the plaintiff, having shown a common source of title with defendants from De Cordova, and defendants themselves having introduced in evidence a deed from the administrator of De Cordova to Cox (one of the defendants) to show title in themselves, were estopped from deny-

ing the validity of the deed from the heirs of Stewart to De Cordova.

That when plaintiff showed a common source of title with the defendants, if plaintiff's title under the common source was the superior title, the burden of proof was shifted on defendants to prove any fact that would defeat plaintiff's right to recover. (R., 30.)

The substance of the ruling is, that where a common source is shown, a party cannot go back of the common source to impeach a deed to the person through whom he claims, and which constitutes one of the links of such party's title.

This was but the enforcement of one of the most frequently applied principles of estoppel. A party cannot claim under and against the same title. This rule rises superior to any question of evidence as to proving a deed, and obviates the necessity of such proof.

The statute relied on by defendants provides, that any instrument which is permitted or required to be recorded which is recorded, shall be admitted in evidence without proof of its execution if it is filed and notice thereof given as the statute requires, unless the opposite party shall within three days before the trial of the cause file an affidavit stating that he believes the instrument to be forged.

Tex. R. S., 2257.

The only affidavit found in the record is that of Tinsley on *motion for continuance.* (R., 28.)

The sole purpose of the affidavit was to obtain a continuance in order to procure the testimony of a certain witness. When this was refused the affidavit had fully performed its function, and should not be considered as putting the genuineness of the deed in issue.

Stubling *vs.* Atkinson, 79 Tex., 164.

On such an affidavit, or even a proper affidavit, it would

have been error to have left the question of the genuineness of the deed to the jury.

The rule in Texas, as embodied in its statutes, is that where both parties claim title from a common source the elder is entitled to recover.

R. S. Tex., 4802.

The effect of a common source is thus stated:

"It overcomes the presumption of right from defendant's possession, and throws upon him the burden of disproving the plaintiff's case or showing a superior title in himself or *in a third person*, which it must appear that he is not *estopped from setting up*.

Keys *vs.* Mason, 44 Tex., 143.

In a case such as the present, the defendant is estopped from denying the title was in the common source.

Keys *vs.* Mason, 44 Tex., 143.
Crabtree *vs.* Whiteselle, 65 Tex., 114.
Morales *vs.* Fisk, 66 Tex., 196.

Where both titles are acquired from a common author, the only question to be inquired into is, in which of the parties is the title of their author vested?

Therefore, in such a case, neither party will be permitted to attack the title of their common author, and between them the elder is the better title and must prevail. This is the inflexible rule.

Gilliam *vs.* Bird, 8 Ired. L., 283.

A defendant cannot assert that the title of the common source is sufficient for his protection and not available to his contestant.

The rule is the same whether the defendants in such a case attempt to show an outstanding title or a purchase by themselves of such title. In either instance, the defense would constitute a denial of the title of the common source.

In the present case the defendants introduced a deed from the administrator of De Cordova (the common source) in order, as they say, mainly to show they were holders in good faith and to be protected as such to the amount of their improvements.

It is immaterial what was the extent of the benefit they hoped to reap from the production of the deed.

They cannot deny to plaintiffs the right to use the same title, nor can they deny the title under which they claim.

Gaines *vs.* New Orleans, 6 Wall., 715.
Robertson *vs.* Pickrell, 109 U. S., 615.
Gibson *vs.* Lyon, 115 U. S., 447.

There is no force in the distinction attempted to be drawn between attacking the title of De Cordova, the common source, and attacking the deed to him by the Stewart heirs conveying the premises.

There is no pretense that De Cordova acquired any title to the premises except by virtue of the deed.

An attack on that deed was an attack on his title.

Nor is the principle affected by the form of the attack. It is the same whether the defendant assails the title for invalidity, forgery, or on other ground.

The marshal by his deed of September 7, 1858, conveyed to plaintiff and those whose rights he afterwards acquired "all the right, title, and interest" of De Cordova in the tract in controversy. (R., 24.)

On May 29, 1884, the defendant Cox obtained a deed for the same premises from the administrator of De Cordova. (R., 29.)

When the party holding the elder and superior title, offered to show title originally in the grantee of both parties, the defendants objected and assailed the conveyance to the common grantor.

This the court below rightly held they could not legally do.

rate interest in a parcel of 72 acres of the land sued for, the value of which is much below the jurisdictional sum.

McCarty *vs.* Prevost, 103 U. S., 673.
Tupper *vs.* Wise, 110 U. S., 398.
Vicksburg R. R. *vs.* Smith, 135 U. S., 197.

The writ of error has already been dismissed as to Echolls, another of the plaintiffs in error.

Respectfully submitted.

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For Defendant in Error.